

No. 12242

United States
Court of Appeals
For the Ninth Circuit.

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED
AUG - 5 1949

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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On appeal from the United States District Court
for the Northern District of California, Southern
Division.

Trial before the Honorable Louis E. Goodman,
District Judge, sitting without a jury.

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil No. 28121G

OVE FOG,

Plaintiff,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Defendant.

COMPLAINT FOR CANCELLATION OF
AGREEMENT ON GROUND OF FRAUD
AND FOR MONEY DUE

I.

Defendant R. C. Williams & Co., Inc., is a corporation duly incorporated under the laws of the State of New York with its principal place of business in the City of New York, State of New York.

II.

Plaintiff Ove Fog is a resident of the City and County of San Francisco, State of California.

III.

That the amount in controversy between the parties in this action, and for which plaintiff seeks judgment, exceeds the sum of \$3000.00.

IV.

Defendant corporation now is and at all times herein mentioned was engaged in the business of

importing and merchandising of wines, spirits and liquors, which merchandise was sold by defendant throughout the several states and territories of the United States. In the conduct of its liquor business defendant corporation at times operated under the designation "Continental Import Division of R. C. Williams & Co., Inc.," and at other times under the designation of "Williams Importers, a Division of R. C. Williams & Co., Inc."

V.

On or about May, 1942, plaintiff was appointed by defendant as manager of the western branch of the liquor division of defendant corporation for the sale and distribution of the various wines, spirits and imported liquors handled by or dealt in by defendant. Western headquarters for such purpose was established at 149 California Street, San Francisco, California. All licenses required for conducting the importation, sale and distribution of liquors throughout said western division of defendant corporation were taken in the name of R. C. Williams & Co., Inc. The territory assigned to plaintiff as manager of said western division comprised the states of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territories of Hawaii and Alaska.

VI.

Plaintiff's compensation for services to be rendered as manager for said western division, and which compensation defendant agreed to pay, was

on the basis of a minimum fee plus a commission on all wines, spirits and liquors sold and delivered by defendant throughout the area comprising the western division so assigned to plaintiff, said commission to be computed as follows:—10c per case for the first 5000 cases; 15c per case for from 5000 to 10,000 cases; 20c per case for from 10,000 to 15,000 cases; 25c per case for over 15,000 cases.

VII.

That in the latter part of 1944 and throughout 1945 and 1946, defendant corporation imported into and sold and caused to be delivered to wholesale liquor dealers in the state of California, Nevada, and Arizona and the Territory of Hawaii 405115 cases of Harwood's Blended Canadian Whisky. In addition to the quantity of Harwood's Whisky so imported and sold in the states of California, Nevada and Arizona and the Territory of Hawaii defendant corporation imported and sold many thousands of cases of said Harwood's whisky in the remaining states and the Territory of Alaska comprising said western area assigned to plaintiff. Plaintiff does not at this time know the exact amount thereof so imported and sold in the said remaining area but according to his information and belief the amount of said Harwood's whisky so imported and sold in the remaining area during said period exceeded 250,000 cases.

VIII.

For a period of more than one year prior to March 8, 1946, a controversy pended between plain-

tiff and defendant corporation over the question of the payment of commissions to plaintiff, at the rates per case above stated, for Harwood's whisky imported and sold by defendant corporation in the western division area assigned to plaintiff as above specified. Defendant corporation falsely and fraudulently and for the purpose of deceiving and misleading plaintiff represented and maintained that defendant corporation had nothing to do with the importation or sale of said Harwood's whisky in the said western division area; and denied that it had demanded or received any commissions on sales of such whisky so imported and sold in said area. Plaintiff was misled by such false and fraudulent representations and did not at that time know the representations so made were false and untrue.

IX.

On or about March 8, 1946, defendant corporation and after repeated statements made by it over a period of several months that defendant had not and was not handling the importation into or sale of Harwood's whisky in the said western division assigned to plaintiff, and was not receiving any compensation for the sale of such whisky in said area, offered to pay plaintiff the sum of \$10,000.00 in full settlement of plaintiff's claim that he was entitled to commissions at the rates per case referred to above on the sales of Harwood's whisky sold and delivered by or through defendant corporation in said western division area. Plaintiff relying on the truthfulness of the false and untrue statements and rep-

representations so made to him by defendant regarding the sale and distribution of Harwood's whisky accepted the offer of settlement so made to him, and defendant did thereupon pay to plaintiff the sum of \$10,000.00. That plaintiff would never have agreed to the settlement so offered by defendant nor would he have accepted the sum of \$10,000.00 paid him by way of settlement of his claim for commissions on the sale of Harwood's whisky if he had not believed the representations made to him by defendant that defendant corporation had nothing to do with the sale and distribution of Harwood's whisky in the said western division area were true and honestly made.

X.

Plaintiff continued to act as manager of the said western division area of defendant corporation under the same terms of employment as were agreed to when he was first employed as such manager in May of 1942. On December 31, 1946, plaintiff and defendant entered into a written contract of employment upon a new and different basis for the sale of certain specified classes of wines and liquors to be sold throughout the western division area referred to above. On April 30, 1947, plaintiff, at the request of defendant, agreed to the cancellation of said written agreement of employment of December 31, 1946, and resigned as manager of the western division area.

XI.

Plaintiff never discovered that the statements and representations made to him by defendant to the

effect that defendant corporation had nothing to do with the sale and distribution of Harwood's whisky in the said western division area, and that it had not demanded or received any commissions or compensation for sales of such whisky so imported and sold, were false and untrue until the latter part of the month of January, 1948, when he was summoned to appear and to testify and produce all correspondence then in his possession relating to the sale of Harwood's Blended Canadian Whisky at a hearing held in San Francisco before a special investigator of the Bureau of Internal Revenue. Knowledge gained by plaintiff as a result of his appearance before the special investigator established the fact that the said statements and representations made to him by defendant corporation were false and untrue.

XII

There is now due, owing and unpaid to plaintiff from defendant commissions on the sale and distribution of the said 405115 cases of Harwood's Blended Canadian Whisky in the states of California, Nevada, Arizona and the Territory of Hawaii, as above recited, the sum of \$91,278.75 after deducting from the full amount of the commissions that became due plaintiff based on the sale and distribution of said 405115 cases of Harwood whisky the sum of \$10,000.00 heretofore paid to plaintiff as alleged in paragraph IX herein; and there is also now due, owing and unpaid to plaintiff from defendant additional commissions computed on the basis of 25c per case for all of said Harwood whisky sold

and distributed in the remaining states and Territory of Alaska of said western division area as alleged in paragraph VI hereof, the exact amount of which is at this time unknown to plaintiff. That no part of said amounts so alleged to be due, owing and unpaid to plaintiff has been paid by defendant or by any person on its behalf.

Wherefore, plaintiff prays judgment against defendant as follows:

1. That the purported settlement between plaintiff and defendant as set forth above be adjudged fraudulent and of no effect.

2. That an accounting be had between plaintiff and defendant to ascertain and determine the exact amount thereof due and unpaid from defendant to plaintiff.

3. For the sum of \$91,278.75 due plaintiff for commission on the sale and distribution of Harwood whisky in the states of California, Nevada and Arizona and the Territory of Hawaii.

4. For the amount of commissions payable to plaintiff on the sale and distribution of Harwood whisky in the states of Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territory of Alaska during the years 1944, 1945 and 1946, when the quantity thereof has been determined, computed on the basis of 25c per case so sold and distributed.

5. For interest on the sums found due plaintiff and for plaintiff's costs of action.

6. For such other and further relief which to the court seems meet and proper in the premises.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

Ove Fog, being first duly sworn, deposes and says: That he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters that are therein stated on his information or belief and as to those matters he believes it to be true.

/s/ OVE FOG.

Subscribed and sworn to before me this 13th day of April, 1948.

[Seal] RUTH NATUSCH,
Notary Public in and for the City and County of
San Francisco, State of California. My Com-
mission Expires January 3, 1951.

[Filed]: June 11, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now Defendant R. C. Williams & Co., Inc., a corporation, and answering the Complaint of Plaintiff is the above-entitled cause, denies, admits and alleges as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

Admits the allegations of Paragraphs I, II and III of said Complaint.

Answering Paragraph IV.

Admits Defendant at all times mentioned in the Complaint of Plaintiff, was engaged in the business of merchandising of wines, spirits and liquors, which merchandise was sold by defendant throughout the several states and territories of the United States; but in this connection defendant alleges that it was at all times mentioned, engaged in the business of importing and merchandising foods and groceries as well as wines, spirits and liquors. Denies the allegations contained in the last sentence of paragraph IV and in that connection alleges that defendant corporation conducts its business under its own name, with headquarters at 265 - 10th Avenue, in the City of New York, State of New York, and as a part of the said business conducted through said office it has imported and sold liquor throughout the

United States and the territories of United States. Prior to any of the times referred to in the Complaint of Plaintiff, Defendant opened up a separate division for European imports and other products, with its headquarters at 610 - 5th Avenue in the City of New York, State of New York. Said division up to on or about March 1, 1945, was conducted under the name and style of

“Continental Import Division,
of R. C. Williams & Co., Inc.”

On or about said March 1, 1945, the name of said division was changed to

“Williams Importers,
A Division of R. C. Williams & Co., Inc.”

The said division conducted business throughout the United States and in the territories of the United States. All of its business was entirely independent of the business conducted by Defendant at 265 - 10th Avenue, New York City; it was under separate management, maintained separate offices and separate accounts and in all respects was a business independent from defendant corporation, save and except that the defendant corporation was the owner thereof.

Answering Paragraph V.

Denies each and every allegation contained in said paragraph, save and except those portions hereinafter admitted, and in this connection alleges that:

Plaintiff, on or about May, 1942, was appointed by Defendant as Manager of the Western Division of said “Continental Import Division.” The said

Western Division covered the States of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and territories of Hawaii and Alaska. The headquarters of said Western Division were and are in the City and County of San Francisco, State of California. At said times the said Western Division of said "Continental Import Division" sold and delivered throughout said western territory, various liqueurs, rums, cordials, champagnes and wines.

All licenses required for conducting the importation, sale, and distribution of the above-named products through said "Continental Import Division" were and are in the name of defendant corporation, but in this connection defendant alleges that the license issued in the name of the defendant corporation for the business conducted from 265 - 10th Avenue, New York, is an entirely separate and distinct license from that issued to it for the business conducted by said "Continental Import Division" at 610 - 5th Avenue, in the City of New York.

On or about December 31, 1946, plaintiff entered into a contract in writing with said "Williams Importers," a copy of which agreement is attached hereto, made a part hereof and marked Exhibit "A."

Answering Paragraph VI.

Denies that plaintiff's compensation was for services to be rendered by him as Manager of the Western Branch of the liquor division of defendant corporation, but in this connection alleges that the com-

compensation he was to receive under his contract was for services to be rendered by him as Manager of said "Continental Import Division." Admits that defendant agreed to pay to plaintiff a compensation based upon the business to be done for said "Continental Import Division," and that said compensation provided for a minimum fee plus a commission on all goods sold by said "Continental Import Division," throughout said western area as follows: 10c per case for the first 5000 cases; 15c per case for from 5000 to 10,000 cases; 20c per case for from 10,000 to 15,000 cases; 25c per case for over 15,000 cases.

Answering Paragraph VII.

Admits the allegations contained in the first sentence of said paragraph. Denies the allegations contained in the remainder of said paragraph and in this connection alleges that the defendant corporation did not sell in excess of 96,592 cases of Harwood Blended Canadian Whiskey in the States other than California, Nevada and Arizona and in the territory of Alaska.

Answering Paragraph VIII.

Admits that for more than a year prior to March 8, 1946, a controversy pended between plaintiff and defendant over the question of payment of commissions to plaintiff at the rates per case set out in paragraph VI of plaintiff's complaint covering Harwood Whiskey imported and sold by defendant corporation in the area covered in plaintiff's said assigned area, but in this connection defendant alleges that said whiskey was not sold by plain-

tiff or through said "Continental Import Division" or said "Williams Importers."

Denies each and every allegation contained in the last two sentences of Paragraph VIII and in this connection denies that defendant represented or maintained that it had nothing to do with the importation or sale of Harwood's whiskey in said area and denies that defendant denied to plaintiff that it had demanded or received any commissions on sales of such whiskey so imported and sold in said area. In this connection defendant alleges that it did import and sell throughout said area Harwood Whiskey and did receive a profit on the sale thereof, but that said sales were made by that portion of defendant's business conducted at 265 - 10th Avenue in the said City of New York, and that no part of said business was conducted by or through said "Continental Import Division" or said "Williams Importers," which said division of R. C. Williams & Co., employed plaintiff as its western Manager.

Defendant further alleges that plaintiff at all times knew that defendant was importing and selling Harwood Whiskey throughout said western territory and that as manager of said "Continental Import Division" and said "Williams Importers" he knew that said whiskey was not being imported or sold or distributed by the said division of defendant corporation.

Answering Paragraph IX.

Denies every allegation contained in said paragraph, save and except as follows:

Admits that prior to March 8, 1946, Plaintiff was not receiving any compensation for the sale of Harwood Whiskey in said area. Admits that defendant paid plaintiff \$10,000.00 in full settlement of plaintiff's claim that he was entitled to commissions at the rates per case referred to in paragraph VI of said Complaint, on sales of Harwood Whiskey sold and delivered by or through said defendant in said area. Alleges that Plaintiff at all times knew of all of the facts relating to said dispute between plaintiff and defendant.

Answering Paragraph X.

Admits all of the allegations of said paragraph, save and except the allegation that the contract of December 31, 1946, was upon a new and different basis; and in this connection defendant alleges that the said contract of December 31, 1946, so referred to in said paragraph is the contract, a copy of which is attached hereto as Exhibit "A."

THIRD DEFENSE

Alleges that if there was any obligation owing from defendant to plaintiff because of the distribution of said whiskey in said western area, said obligation was extinguished by the said settlement arrived at between plaintiff and defendant on or about March 8, 1946, in which defendant paid and plaintiff accepted the sum of \$10,000.00 in full satisfaction and extinction of said claim. The said settlement agreement was in writing and a copy thereof is attached hereto, made a part hereof and marked Exhibit "B."

FOURTH DEFENSE

Said claim of plaintiff against defendant and every portion thereof is barred by the provisions of Section 339, Subdivision (1), Code of Civil Procedure of the State of California.

Wherefore, defendant prays that plaintiff take nothing by his action and that it may go hence with its costs.

JULES JACOB,
By JAMES FARRAHER.

SULLIVAN, ROCHE,
JOHNSON & FARRAHER.
By JAMES FARRAHER,
Attorneys for Defendant.

Receipt of a copy of the foregoing is hereby admitted this 27th day of July, 1948.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

[Endorsed]: Filed July 28, 1948.

EXHIBIT A

Telephone Columbus 5-0422
Cable Address: Ortavaud, N. Y.

Williams Importers
A Division of R. C. Williams & Co., Inc.
Wine and Spirit Merchants

610 Fifth Avenue
New York 20, N. Y.

Jean Ravaud
General Manager
N.Y.S. License L.L. 64

December 31, 1946.

Mr. Ove Fog
Williams Importers
A Division of R. C. Williams & Co., Inc.
Western Division Office
149 California Street
San Francisco 11, California

Dear Mr. Fog:

This is to confirm our agreement concerning the terms of your employment as Manager of the Western Division of Williams Importers, a Division of R. C. Williams & Co., Inc.

Any and all previous agreements for your employment by us for any period subsequent to the date hereof are terminated and cancelled.

The term of your employment hereunder shall

commence January 1, 1947, and terminate December 31, 1947. This agreement shall be automatically renewable from year to year unless either party notifies the other by registered mail 60 days prior to the termination of any yearly period of his or its intention not to renew said agreement.

You are to receive a commission of 25 cents per case upon the following products sold and delivered in your territory:

Grand Marnier Cordon Rouge Liqueur—Metaxa Greek Specialties—Corgo Brandy & Port Wines—Lozeron Swiss Wines—Diez Hermanos Sherries—Havana Club Cuban Rums—Havana Club Puerto Rican Rums—Bardinet Cordials—Bardinet Specialties—G. H. Mumm Champagnes—Domaines Dopff Alsatian Wines—F. Chauvenet Wines.

In any event you are to receive on account of the aforesaid commissions a “minimum commission” of \$18,000.00 per annum payable in equal semi-monthly installments of \$750.00 each on the 15th and last day of each month. Any commissions earned by you in excess of said “minimum commissions” in the sum of \$18,000.00 shall be paid to you within 30 days after the last day of the year.

Commissions statements are to be rendered monthly.

Commissions on returned merchandise will be charged back against your commission account.

On any additional products that may be handled by this Division for sale in your territory, in the event that the commission fixed by us is less than 25

cents per case and you do not agree to such lesser amount, the amount of commission on such new item is then to be determined by arbitration pursuant to the Arbitration Law of the State of New York and under the rules of the American Arbitration Society in such cases made and provided.

Your territory consists of the following:

California, Oregon, Washington, Wyoming, Utah, Nevada, New Mexico, Montana, Arizona, Idaho, Alaska, Hawaii.

Williams Importers reserves the right to determine the quantities of any of its products to be allocated for sale in your territory.

All orders for the sale of merchandise shall be subject to the approval of the Credit Department of the New York Office.

Your duties, generally, subject always to the direction and control of our New York Office, shall consist of the following:

To supervise and be responsible for the proper operation of our Western Office.

To employ all necessary personnel after first obtaining the approval of the New York office.

To sell and supervise sales and do all the necessary travelling in connection with same.

Appointment of new or any change of present distributors shall be made by you only with the consent of the New York office.

You are to render an itemized expense account monthly covering all reasonable business expenses.

You are to devote your full and exclusive time and effort to the conduct of our business.

Very truly yours,

WILLIAMS IMPORTERS.
/s/ JEAN RAVAUD,
General Manager.

Accepted and approved:
/s/OVE FOG.

EXHIBIT B

March 8, 1946.

Mr. Ove Fog:

This will confirm our oral agreement of this week, to the effect that while we do not recognize any claim for any commissions on Harwood Whiskey sales in your territory, having previously advised you that Williams Importers has nothing to do with this product, we, in order to obviate any disagreement between us, will pay you the sum of \$10,000. in full and final settlement of all claims which you have made and claims you might assert in the future on the sales of Harwood Whiskey in your territory, as long as this product is not directly handled by the Williams Importers Division.

Will you please sign the original and duplicate signifying your acceptance and return same to us?

Upon receipt of the duplicate and original, your

copy signed by us will be forwarded to you together with our check.

WILLIAMS IMPORTERS.

/s/ JEAN RAVAUD,

General Manager.

Accepted and Approved:

By /s/ OVE FOG.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly before me on Tuesday, December 28, 1948, a Jury having been waived. Plaintiff appeared by his attorney, Richard tum Suden, and the defendant corporation appeared by Jules Jacobs, and by James Farraher representing the law firm of Sullivan, Roche, Johnson & Farraher. The plaintiff placed before the Court his evidence, both oral and documentary, and having completed the presentation of his evidence, rested his case. Thereupon defendant corporation, by its counsel on Wednesday, December 29th, without waiving its right to offer evidence in the event its motion should not be granted, moved for dismissal of said action under Rule 41 (b) of the Rules of Civil Procedure upon the ground that upon the facts and the law the plaintiff had shown no right to relief.

The said motion was argued by the Counsel for

each party and after giving consideration to the evidence introduced by plaintiff and the argument of Counsel, I hereby grant said motion upon the grounds stated and find as follows:

FINDINGS OF FACT

I.

The allegations of paragraphs I, II and III of Plaintiff's Complaint are and each of them is true.

II.

The defendant corporation at all times herein mentioned was engaged in the business of importing and merchandising of wines, spirits and liquors and other merchandise with its principal office at 265 Tenth Avenue, City of New York, State of New York. During all of the times referred to in the complaint of plaintiff, defendant corporation maintained a division for the importing and merchandising of wines, spirits, liquors and other merchandise, other than whiskey, throughout the several states and territories of the United States. At all times referred to in the complaint of plaintiff, said division had its principal place of business at 610 Fifth Avenue, City of New York, State of New York, and conducted its business separate and apart from that conducted by defendant corporation at 265 Tenth Avenue, said city. In May, 1942, the said division operated under the designation of "Continental Import Division of R. C. Williams & Co., Inc.," which name was thereafter changed to

“Williams Importers, a Division of R. C. Williams & Co., Inc.”

On or about May, 1942, plaintiff was appointed by the said “Continental Import Division of R. C. Williams & Co., Inc.,” as Manager of its Western Branch for the sale and distribution of wines, spirits and imported liquors handled or to be handled by said division, with the headquarters of said branch established in the City and County of San Francisco, State of California. The territory assigned to said Western Division, of which plaintiff was appointed Manager, consisted of the States of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territories of Hawaii and Alaska.

The terms of the said employment of plaintiff were agreed upon orally between plaintiff and the manager of said division of defendant corporation, and provided that in addition to his salary, plaintiff should receive a yearly commission or bonus of 10c per case for the first 5000 cases of wines, spirits or liquors sold by said division; 15c per case for from 5000 to 10,000 cases so sold; 20c per case for from 10,000 to 15,000 cases and 25c per case for every case over 15,000 cases.

III.

On or about April 8, 1944, defendant R. C. Williams & Co., Inc., operating from its office at 265 Tenth Avenue, New York City, New York, entered into a written agreement with Distillers Agency, Inc., representing the Canadian Distillery which

manufactures Harwood's Whiskey, wherein R. C. Williams & Co., Inc., was designated exclusive agent to distribute Harwood's Whiskey in United States of America, and wherein it was agreed that upon sales outside Metropolitan New York "as and for commissions, allowances and remunerations for its efforts and services," Defendant R. C. Williams & Co., Inc., was to purchase said whiskey at \$19.05 per case, f.o.b. Vancouver, British Columbia, and to sell the same f.o.b. Vancouver, Canada, at \$20.77 per case, of which 12c represented the cost of "strip stamps," leaving a gross profit to said defendant of \$1.60 a case in all parts of the United States, save and except the State of New York, subject to a contract entered into on or about April 20, 1944, between said defendant corporation and said Distillers Agency, Inc., which required said defendant corporation, out of said gross profit of \$1.60 per case to pay a brokerage or selling commission of not in excess of 60c per case to brokers or selling agents selected by it, but approved in writing by said Distillers Agency, Inc. Said contract of April 20th, 1944, gave to the said Distillers Agency, Inc., the right to refuse to sell to any customer from whom defendant corporation might receive an order for said whiskey. Pursuant to said contract of April 18, 1944, and said contract of April 20, 1944, defendant corporation, operating from its said office at 265 Tenth Avenue in New York City, State of New York, accepted orders for 405,150 cases of said Harwood's Whiskey from wholesale liquor dealers in

the States of California, Nevada, Arizona and the Territory of Hawaii, and accepted orders for 96,592 cases of said whiskey from wholesalers for the States of Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the Territory of Alaska. Said whiskey so ordered by said wholesalers was shipped direct to said wholesalers in the said respective states and territories from the said Distillery at Vancouver, Canada, and the invoices therefor were made up and mailed out by defendant corporation from its said office at 265 Tenth Avenue, New York City, State of New York. Each of the bottles of Harwood's Whiskey so shipped into said states and territories bore on its label, the words "Imported by R. C. Williams & Co., Inc."

IV.

In the Fall of 1944, at about the time the shipments of Harwood's Whiskey into said states and territories were commenced, plaintiff discovered said fact and observed that the labels on the bottles of said whiskey carried the words "Imported by R. C. Williams & Co., Inc.," and he immediately protested the distribution of said whiskey in the states and territories assigned to him in his contract with said "Continental Import Division," which was later known as "Williams Importers," without the said distribution going through the said Continental Import Division or Williams Importers, and he demanded of defendant corporation a commission on the sales of Harwood's Whiskey shipped into his said territory. Defendant corporation, through its

officers, advised him that he was not entitled to any commissions on said whiskey. The dispute between plaintiff and the officers of defendant corporation with reference to plaintiff's claim for said commission was continued from the Fall of 1944 until March 8, 1946, in the form of exchanges of letters and oral conversations. During the exchange of letters between plaintiff and the officers of defendant corporation with reference to said claim, Plaintiff was advised by his superior officers that the only money defendant corporation made or was making out of the sale of said Harwood's Whiskey in the said territory claimed by plaintiff was \$1.00 per case. Plaintiff offered no evidence to show that this advice was not correct and true. At all times during said exchange of correspondence, and said oral conversations, plaintiff knew that defendant corporation was making \$1.00 a case profit on the whiskey shipped into said territory; that any sales of said whiskey in said territory had to "clear" through defendant corporation and that the invoices for the sales of said whiskey were issued from the office of defendant corporation at 265 Tenth Avenue, New York City, State of New York.

V.

The division of defendant corporation by which plaintiff was employed, which as hereinabove stated, was called for a time "Continental Import Division," and then was changed to "Williams Importers," did not during any of the period involved in this action have anything to do with the importa-

tion into or sale of Harwood's Whiskey in the said territory assigned plaintiff, which fact plaintiff well knew. It is not true as alleged in paragraph VIII of plaintiff's complaint that defendant corporation "falsely and fraudulently and for the purpose of deceiving and misleading plaintiff represented and maintained that defendant corporation had nothing to do with the importation or sale of Harwood's Whiskey in the said western division area," but the contrary is true, namely, that throughout said period plaintiff was advised that defendant corporation did take part in the importation and sale of Harwood's Whiskey in the said territory assigned to plaintiff. It is untrue as alleged in said paragraph of said complaint of plaintiff that defendant corporation "denied that it demanded or received any commissions on sales of such whiskey so imported or sold in said area."

VI.

In the Fall of 1945, plaintiff agreed with Hugo Jaburg, President of defendant corporation, that the claim of plaintiff should be arbitrated before the Arbitration Board of the State of New York. The trial of said arbitration was delayed for some time through the absence of certain officers of defendant corporation, and on or about January, 1946, plaintiff in writing advised the officers of defendant corporation that through advice of his counsel he had determined that it would be to his interest to have his claim passed upon by a Court of the United States, rather than by a Board of Arbitration.

VII.

Thereafter and on or shortly prior to the 8th day of March, 1946, plaintiff met with the officers of defendant corporation for the purpose of making an effort to settle the pending dispute between them as to the claim of plaintiff that he was entitled to a commission on the said shipments of Harwood's Whiskey into his said territory.

VIII.

At the time of said negotiations for settlement on, and for many months prior to, March 8th, 1946, plaintiff knew that Harwood's Whiskey was being shipped directly into his said territory and that the orders therefor were received by defendant corporation and by it relayed to the said Distillery, and that the invoices thereon were issued out of the office of defendant corporation at 265 Tenth Avenue in New York City and he knew that defendant corporation was making a profit of \$1.00 upon each case so shipped into his said territory.

IX.

On or about said March 8th, plaintiff and the officers of defendant corporation met and negotiated a settlement of said claim of plaintiff to a commission on the sales of said whiskey, and defendant corporation agreed to pay the sum of \$10,000.00 to plaintiff in full satisfaction and final settlement of his claim, and of any claim that he might assert in the future to a commission on sales of Harwood's Whiskey in his territory as long as the

said whiskey was not thereafter directly handled by Williams Importers, the division under which he was employed. The said sum of \$10,000 was suggested by plaintiff. Thereafter plaintiff was paid said sum of \$10,000.00 by defendant corporation in full and final settlement of his said claim and plaintiff accepted the same as a full and final settlement of his said claim by signing a document dated March 8, 1946, a copy of which is attached to the Answer of Defendant Corporation herein as Exhibit "B" thereof, and simultaneously plaintiff entered into a new agreement in writing with said Williams Importers, whereby his right to commission was limited to the sales of certain liqueurs, brandies, wines, rums, cordials and champagnes, and to any additional products that might be handled by Williams Importers, the division by which plaintiff was employed.

X.

Prior to the making of said settlement, plaintiff had the advice of his attorney with reference to his claim. No fraud was practiced upon him by defendant corporation or any of its officers and no misrepresentations were made by them to him and he therefore was not induced to enter into said settlement by any fraud or misrepresentation on the part of defendant corporation or any of its officers. Any claim plaintiff had for commissions on the sales of said whiskey was merged in and fully satisfied by said settlement.

XI.

The allegations contained in paragraph XI of plaintiff's complaint are untrue, save and except the allegation that he was summoned to appear and testify and produce all correspondence then in his possession relating to the sale of Harwood's Whiskey at a hearing held in San Francisco before a Special Investigator of the Bureau of Internal Revenue.

XII.

There is not due from defendant corporation to plaintiff any commission on the sale or distribution of Harwood's Whiskey in the said territory claimed by plaintiff.

XIII.

Plaintiff on the presentation of his evidence failed to establish any right to recover anything from defendant corporation, in that upon the facts established by the evidence offered, and upon the law, plaintiff has shown no right to any relief.

From the foregoing facts I draw the following

CONCLUSIONS OF LAW

I.

Plaintiff is not entitled to judgment against defendant corporation in any sum whatsoever.

II.

Defendant corporation is entitled to judgment against plaintiff for its costs incurred in this action.

III.

The motion of defendant corporation to dismiss

this action under Rule 41 (b) of the Rules of Civil Procedure on the ground that upon the facts and the law, plaintiff has shown no right to relief, has been properly granted.

IV.

Judgment should and shall be entered in favor of defendant corporation and against plaintiff for the costs incurred by it, in this action.

Dated January 4th, 1949.

/s/ LOUIS GOODMAN,

Judge of the Above-Entitled
Court.

Receipt of a copy of the foregoing is hereby admitted this 4th day of January, 1949.

/s/ RICHARD TUM SUDEN,

Attorney for Plaintiff.

The amendments proposed by plaintiff to the above findings I find to be not meritorious and I have disallowed them.

Jan. 14, 1949.

/s/ GOODMAN,

District Judge.

[Endorsed]: Filed Jan. 14, 1949.

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil No. 28121G

OVE FOG,

Plaintiff,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Defendant.

JUDGMENT

The above-entitled cause having come on regularly before me, sitting without a jury, on the 28th day of December, 1948, and plaintiff having presented his evidence and rested his case; and Defendant Corporation having moved for a dismissal of said action under the authority of Rule 41 (b) of the Rules of Civil Procedure, and said motion having been granted by me,

And Findings of Fact and Conclusions of Law having been signed and filed;

Now, Therefore, it is adjudged that:

(1) Plaintiff take nothing by his said action, and that

(2) Defendant recover of plaintiff its costs and disbursements, in the sum of \$.....

Dated January 19th, 1949.

/s/ LOUIS GOODMAN,

Judge of the Above-Entitled
Court.

Entered in Civil Docket Jan. 20, 1949.

Receipt of a copy of the foregoing is hereby admitted this 5th day of January, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 19, 1949.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL AND NOTICE
OF MOTION FOR A NEW TRIAL

To the Honorable Louis E. Goodman, Judge of Said
United States District Court, and to Messrs.
Jules Jacobs, Sullivan, Roche, Johnson & Far-
raher, Attorneys for Defendant.

Please Take Notice that Ove Fog, the plaintiff herein, intends to and does hereby move said court to vacate and set aside the judgment of this court heretofore rendered in favor of the defendant and against plaintiff, in the above-entitled action and to grant plaintiff herein a new trial herein.

Said motion will be made upon the minutes of said court and all the papers and pleadings on file herein.

Dated this 31st day of January, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL

To R. C. Williams & Co., Inc., Defendant Above
Named, and to Messrs. Jules Jacobs, Sullivan,
Roche, Johnson & Farragher, Its Attorneys:

Please Take Notice that the undersigned will
bring the above motion on for hearing before this
court at Room 258, United States Courts and Post
Office Building, City and County of San Francisco,
State of California, on the 7th day of February,
1949, at 10:00 o'clock in the forenoon of that day
or as soon thereafter as counsel may be heard.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff,
605 Market Street, San
Francisco.

Receipt of a copy of the foregoing Notice of Mo-
tion is hereby admitted this 31st day of January,
1949.

SULLIVAN, ROCHE,
JOHNSON & FARRAHER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 31, 1949.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Plaintiff's motion for a new trial herein is hereby denied.

Dated: March 23, 1949.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed Mar. 23, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that Ove Fog, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth District from the Judgment of Dismissal and Order Denying Motion for New Trial entered in this action on March 23, 1949.

/s/ RICHARD TUM SUDEN,

Attorney for Appellant

Ove Fog.

[Endorsed]: Filed Apr. 22, 1949.

[Title of District Court and Cause.]

DEPOSITION OF HUGO F. JABURG

Examination of Hugo F. Jaburg and Jean Ravaud, witnesses on behalf of plaintiff, held at the office of James A. Davis, attorney, at 259 Broad-

(Deposition of Hugo F. Jaburg.)

way, New York City 7, New York, on November 16th, 1948.

Present: Richard tum Suden, Esq., attorney for plaintiff, Jules Jacobs, Esq., attorney for defendant, Mr. Hugo F. Jaburg, Mr. Jean Ravaud, Mr. Ove Fog and Ruth H. DuFord.

Stipulated that all objections to the questions submitted shall be reserved and shall be presented at the time of trial.

MR. HUGO F. JABURG

being first duly sworn:

By Mr. tum Suden:

1. Q. Mr. Jaburg, you are Hugo F. Jaburg?

A. Correct.

2. Q. You reside in New York, where?

A. I reside at Winterton, New York.

3. Q. And you are engaged in business in New York? A. I am.

4. Q. In what business are you?

A. I am president of R. C. Williams & Co., Inc.

5. Q. Where is your office?

A. Principal office, 265 Tenth Avenue, New York City.

6. Q. What is the nature of the business of R. C. Williams & Co.?

A. R. C. Williams is in the food business and in the wine and spirits business. [1*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

(Deposition of Hugo F. Jaburg.)

7. Q. You have a liquor division of R. C. Williams, is that the way it is?

A. We have a wholesale liquor division.

8. Q. How does that operate, what are its functions?

A. Supplies wholesale liquor to retail businesses, that is, both hotels and restaurants, principally in the metropolitan district.

9. Q. District of New York?

A. That is correct.

10. Q. You have a liquor distribution division as part of it?

A. I wish you would clarify the question.

11. Q. In addition to the wholesale liquor department, do you have an importing department or is that part of your liquor division?

A. We have a separate corporation, a subsidiary corporation.

12. Q. At the present time?

A. It is known as Carillon Importers, Ltd., place of business, 610 Fifth Avenue.

13. Q. That corporation is wholly owned?

A. Wholly owned by us.

14. Q. It is one—does it handle exclusively the distribution of imported liquor in the United States?

A. It handles imported as well as domestic.

15. Q. It distributes throughout the United States? A. That is correct.

16. Q. May I ask to please fix the time, referring back to 1942—say March, 1942, or the first

(Deposition of Hugo F. Jaburg.)

part of 1942, did you then have a wholesale liquor division? A. We did.

17. Q. Do you also have a distribution division or is that all one division?

A. At that time we had a wholesale division, which operated out of 265 Tenth Avenue under its own license and in addition to that we had an import division which operated out of 610 Fifth Avenue under a separate license.

18. Q. What did the import division handle?

A. It handled principally the same items that they handle today, that is, the same type of items, imported and certain domestic. [2]

19. Q. That is a part of R. C. Williams & Co.?

A. That is right.

20. Q. A department of it?

A. Operated as a separate business, with its own sales force, billing department, license.

21. Q. A division of it?

A. It was a division of R. C. Williams.

22. Q. And R. C. Williams owned the business, did it not? A. Yes.

23. Q. That is in 1942. Did that set up continue into subsequent years of 1943, 1944, 1945, 1946 and 1947? A. Yes.

24. Q. The import division, was that separate from the wholesale division? A. Yes.

25. Q. What products did it handle in 1942? Did they have a separate line of products?

A. Yes, they had a separate line of products. I can't give you the exact items.

(Deposition of Hugo F. Jaburg.)

26. Q. Did that import division have a special name?

A. It was originally known as the Continental Division and thereafter the name was changed due to the confusion with Continental Distributors Company and it was called Williams Importers Division, a division of R. C. Williams.

27. Q. When was Williams Importers—when was the name of the import division changed from Continental to Williams Importers?

A. I do not recall the exact date. If we refer to the records we can.

28. Q. I noticed in the answer it gives you the date.

Mr. Jacobs—I might state for the record, because the date is not important, that the Williams Importers was the same business, the same method of operation as was conducted in the Continental Importers.

29. Q. Referring to the pleadings in this case, have you read the complaint?

A. Generally I have read it.

30. Q. You have read it and you have read the answer, you know the allegations in the answer?

A. Well, I have a general knowledge of it, to be honest I do not recall all of it. [3]

31. Q. Speaking generally the allegations are correct?

A. Yes, the allegations are correct.

32. Q. You set forth certain answers in the answer and those findings are correct? A. Yes.

(Deposition of Hugo F. Jaburg.)

33. Q. Do you know Ove Fog? A. Yes.

34. Q. When did you first become acquainted with him, can you fix a date?

A. I cannot fix a date, probably in 1943.

35. Q. Prior to that date Mr. Fog had been employed by R. C. Williams Co., the Continental Importers, had he not?

A. Prior to the time I met him, he was engaged by Mr. Ravaud.

36. Q. What was the nature of his employment, do you know?

A. He was branch division manager for the Continental Importers division.

37. Q. Covering what territory?

A. The western territory.

38. Q. That is the territory referred to in the answer you set forth? A. That is right.

39. Q. Who employed Mr. Fog?

A. Mr. Ravaud employed Mr. Fog for Continental Importers Division.

40. Q. Who was Mr. Ravaud?

A. Mr. Ravaud is general manager of that division.

41. Q. He was in charge of that division?

A. Correct.

42. Q. Did he have any other function with R. C. Williams Co. A. No.

43. Q. He had the entire management and control of that division?

A. Subject to the executive officers and Board of Directors of the company itself.

(Deposition of Hugo F. Jaburg.)

44. Q. I might ask you, the employment of Mr. Fog was left to Mr. Ravaud, was it not? [4]

A. Yes, Mr. Ravaud employed Mr. Fog with an explanation to us of his qualifications and his belief that Mr. Fog would be a good employee for the company.

45. Q. Mr. Ravaud was authorized to employ Mr. Fog, was he not? A. He was.

46. Q. Did Mr. Ravaud fix the terms and conditions of Mr. Fog's employment?

Mr. Jacobs: I am going to object.

Mr. tum Suden: Mr. Fog's employment is important, I should like to ask this question.

47. Q. Would you say that Mr. Ravaud was an agent of R. C. Williams in the employment of Mr. Fog? A. Yes.

Mr. Jacobs: I object to the form of the question.

48. Q. You said he was authorized, I said he fixed the terms and conditions of his employment?

Mr. Jacobs: First it was as submitted to them and he acted on Mr. Jaburg's determination.

Mr. Jaburg: An agreement was drawn and it was approved by our attorney.

Mr. Jacobs: Not at that time.

49. Q. At the time Mr. Fog was employed I understand it was an oral agreement, so-called gentlemen's agreement.

A. I believe that is correct.

50. Q. Did R. C. Williams ratify and approve Mr. Fog's employment? A. They did.

(Deposition of Hugo F. Jaburg.)

51. Q. And the terms he had agreed upon?

Mr. Jacobs: I don't like to interrupt you, but you are asking him to make a legal conclusion. To the question—pursuant to such arrangements, did Mr. Fog [part of sentence omitted in copy] employment of the company, the answer is "yes."

52. Q. Under the terms and provisions agreed upon with Mr. Ravaud? A. Yes.

53. Q. R. C. Williams then had approved of the employment of Mr. Fog, stood back of him in the matter of his compensation and employment?

A. Yes. [5]

54. Q. Do you know, can you recall the terms and provisions of Mr. Fog's employment?

A. No.

Mr. Jacobs: That is outside of the issues. I do not think we are concerned with the terms of the employment and I am going to have to ask you to restrict yourself to the written agreement.

Mr. tum Suden: I disagree with you, they had an oral agreement under which Mr. Fog was employed and I am also getting into the written agreement and the oral agreement.

55. Q. I ask you then again, do you recall the terms and conditions of Mr. Fog's employment?

Mr. Jacobs: If you don't know you can say so.

A. Not without referring to the records. Generally I remember the agreement as to his appointment as western division manager.

56. Q. Could I put it this way—is it correct to

(Deposition of Hugo F. Jaburg.)

state that Mr. Fog was to receive compensation such as they agreed upon, a fixed sum of \$4,200, do you remember that?

A. I do not recall the exact sum. It was a certain amount of money plus a commission on certain items which were distributed through the import division.

57. Q. He was to receive, was he not, in addition to the fixed sum a commission on all liquor that was sold or distributed in his territory by the Continental Importers?

A. I believe that is correct as far as the sales of Continental are concerned.

58. Q. Is it not true that Mr. Fog's agreement covered not only current line of products that you then had at the time the agreement was made, as well as all future products that may be acquired by Continental and sold and distributed in that territory?

Mr. Jacobs: The oral agreement.

Mr. tum Suden: They had a certain line at that time, then if they acquired any additional lines he was to receive compensation on these additional lines.

Mr. Jacobs: Subject to arrangements of commissions.

Mr. tum Suden: With the schedule they fixed.

Mr. Jacobs: The schedule applies to the written agreement. [6]

Mr. tum Suden: It was not——

(Deposition of Hugo F. Jaburg.)

Mr. Jacobs: I have no schedule in my file. When we get to Mr. Ravaud we might work that out.

59. Q. I am going back to the general question that on additional lines it was understood he was to get the same commissions on the number of cases sold?

A. I don't recall the amount of commissions, but every item would have a different profit and you could not make a set rule that anything acquired in the future would bear the same commission.

60. Q. Do you know that or are you reasoning that way?

A. I know that I would not approve of such oral arrangements and I know Mr. Ravaud would not make it.

61. Q. If, after this oral arrangement was made you picked up a line of brandy and Mr. Fog handled that brandy in his territory, he would get the same commission on the cases of that brandy sold?

A. Not necessarily, he might receive a larger commission on an item like champagne and on brandy.

62. Q. Do you know of your own knowledge whether or not these terms were fixed by Mr. Ravaud?

A. Mr. Ravaud never made any statements to me that he had definite arrangements with Mr. Fog for specified commission on any item we might carry at any time.

(Deposition of Hugo F. Jaburg.)

63. Q. As I understand it, the commissions were fixed at the sliding scale, so much for the first 1,000, so much for the next 5,000, so much for the next 10,000 cases?

A. I would have to go back to the record.

64. Q. Put it this way, Mr. Jaburg. Suppose Mr. Ravaud had assured Mr. Fog that he would receive compensation on all liquors sold in his territory by Continental Importers of the R. C. Williams Co.—I say supposing he had made that arrangement with Mr. Fog—we will have to develop that, of course—supposing he had made such an agreement with Mr. Ravaud, you would concede that he would be entitled to his commissions?

A. Not in the case with R. C. Williams, but any arrangements that have been discussed with me were with regard to the Continental and I would want to see Mr. Fog compensated in the proper manner. Mr. Ravaud could not bind the company. He is only general manager of the import division.

65. Q. Suppose Mr. Ravaud has assured Mr. Fog that no liquor would be sold or shipped into his territory by R. C. Williams except through Continental Importers, would he then be entitled to his commissions? [7]

A. No, as I said before, Mr. Ravaud had no authority to go beyond the Import division.

66. Q. He represented R. C. Williams?

A. Only so far as the Import division was concerned and Mr. Fog was informed of that.

(Deposition of Hugo F. Jaburg.)

67. Q. Was not the employment of Mr. Fog left entirely in the hands of Mr. Ravaud?

A. Subject to the approval of the executives and the Board of Directors of R. C. Williams.

68. Q. That is between you and Mr. Ravaud, but between Mr. Fog and R. C. Williams there was no such understanding?

A. Mr. Fog knew that Mr. Ravaud was manager of the Import division and I am quite sure that Mr. Fog therefore knew that he would have nothing to do with any part of the business except by the Import division.

69. Q. If Mr. Ravaud in seeking Mr. Fog's employment made certain representations to him along the lines I have just discussed, and these representations were not denied by R. C. Williams & Co., would he not then be able to rely on the assurances of Mr. Ravaud?

A. I can only say that Mr. Ravaud had no authority to go beyond the Import division and I cannot assume that Mr. Ravaud made promises beyond that.

70. Q. I am not asking that question I am asking you assume Mr. Ravaud did that?

A. It was not binding on the company. Mr. Ravaud had no authority to go beyond the Import division.

71. Q. That is your reasoning for that, he should not receive commissions on additional lines?

A. No, I made the statement that had we taken

(Deposition of Hugo F. Jaburg.)

on any additional lines in the Import division and had sold them in the western territory, Mr. Fog would certainly be entitled to commissions depending on the profit.

72. Q. When did R. C. Williams take on the Harwood whiskey line?

A. I believe it was in 1944.

73. Q. That was subsequent to the employment of Mr Fog? A. That is right.

74. Q. Did R. C. Williams & Co. handle that as a wholesale distributor in the metropolitan area of New York?

A. They handled it—yes, as a wholesale distributor as well as—— [8]

75. Q. They handled it as a distributor in the United States, did they not?

A. Mr. Jacobs, tell him the reasons why Harwood was in on the——

76. Q. Can you not answer this—national distributor in the United States. Can you answer yes or no?

Mr. Jacobs: It is yes and no.

A. Harwood whiskey was handled by R. C. Williams on an entirely different basis than in our Import division. While we acted as a distributor for the brand in the United States at the insistence of the distillery, it was not included in our regular import division due to the fact that this distiller had certain distributors of his own through whom he had sold other products and he insisted upon

(Deposition of Hugo F. Jaburg.)

having these distributors handle Harwood as a different item and he also insisted upon appointing his own sales force who acted as brokers and received a brokerage on the sale of this whiskey.

77. Q. Is it not a fact that these sales of this liquor were handled through R. C. Williams against a thirty-day letter of credit?

A. They were handled by R. C. Williams through the wholesale liquor division as a separate item—different billing under a different license than that of the Continental Import division or the Williams Importers.

78. Q. How were orders placed with R. C. Williams & Co.?

A. Through these various brokers who operated throughout the United States.

79. Q. I do not understand that answer.

A. The orders were placed by the broker appointed by the distiller and telephoned or mailed into Mr. Irving Koerner who was in charge of our wholesale division at 265 Tenth Avenue.

80. Q. Mr. Koerner accepted these orders against a letter of credit?

A. Yes, he did.

Mr Jacobs: The way you put the question it is very easy to say "yes."

Mr. tum Suden: I am asking this witness, he can say, I do not think you should advise the witness how to answer, Mr. Jacobs.

Mr. Jacobs: Except this—we have a written

(Deposition of Hugo F. Jaburg.)

agreement and I cannot let the witness testify contrary to this agreement when I know he does not remember.

Mr. tum Suden: You can produce these agreements at the proper time, they speak for themselves. [9]

81. Q. The R. C. Williams Co. accepted the orders for Harwood whiskey against letters of credit, did they not?

A. We had various agreements with the distiller and I do not recall exactly the method of handling these orders without referring to the file.

82. Q. Is it not true that R. C. Williams then notified the distiller where to make delivery?

A. I do not recall the exact procedure. It was left in the hands of Mr. Koerner.

83. Q. Mr. Koerner accepted the orders on behalf of R. C. Williams?

A. I do not recall the method of handling these orders.

84. Q. Did you ever have any discussion with Mr. Fog relative to commissions on Harwood whiskey?

A. I believe we discussed the situation at one time and I explained to him then that while I would have liked personally to have had this brand in the Import division it was impossible under the arrangements it was stipulated by the distiller.

85. Q. Do you recall when that was and where?

A. I do not.

(Deposition of Hugo F. Jaburg.)

86. Q. Anybody else present?

A. I do not recall when and where.

87. Q. Was there only one conversation on that subject?

A. There might have been more.

88. Q. Did you have any conversation with Mr. Fog at the Palace Hotel in San Francisco?

A. I had many conversations with Mr. Fog at the Palace Hotel, but perhaps not about Harwood.

89. Q. Do you recall any about Harwood?

A. No, except my explanation at the time that there was nothing we could do about it.

90. Q. You do not recall where?

A. It might have been in the Palace Hotel or in New York.

91. Q. Do you recall the incident when you agreed that Mr. Fog should receive the sum of \$10,000 in settlement of his claim for commissions on Harwood whiskey? [10]

A. I recall the sum of \$10,000, but not exactly what the situation was without going back to the files. May I say at this time that R. C. Williams is quite a large organization with many departments. It would be impossible for me to recall items and times and places of matters such as these in business of this sort. We have a volume in cases of \$40,000,000 a year on liquor and groceries and if I was able to recall all of the items of two different liquor departments I would be a marvel.

92. Q. What was the gross in the liquor division?

(Deposition of Hugo F. Jaburg.)

A. That is varied from time to time, perhaps it has gone as high as \$15,000,000 or \$20,000,000 on the two liquor divisions.

93. Q. Per annum? A. Per annum.

94. Q. You do not recall the time you met Mr. Fog and made this agreement with him relative to his compensation?

A. I do not recall the exact terms of any agreement without going to that agreement and refreshing my memory.

95. Q. You do not know how the sales of Harwood whiskey were handled by R. C. Williams?

A. I do not recall the exact details, changes were made from time to time.

96. Q. May I ask you this question—did you deny to Mr. Fog that he was entitled to commissions on Harwood whiskey?

A. Yes, in view of the fact it was handled apart from the Import division and he was an employee of the Import division.

97. Q. You based your decision on that reason?

A. Yes, he was fully informed of the facts and continued to work for us.

98. Q. Did you inform him personally?

A. I believe I discussed the matter with him personally on one of my visits to the coast or when he was in New York.

99. Q. Subsequent to that settlement of which you have a vague recollection, did you then make any further agreements with Mr. Fog in regard to his employment?

(Deposition of Hugo F. Jaburg.)

A. I do not recall at this time. [11]

100. Q. Do you know whether he had any written agreement concerning his employment?

A. Yes, I believe there was a written agreement entered into with regard to the amount of commissions to be paid, naming various items on which these commissions were to be paid.

101. Q. You do not recall the period?

A. Not without reference to the records.

Mr. tum Suden: That is all, Mr. Jaburg.

By Mr. Jacobs:

1. Q. Is it not a fact, Mr. Jaburg, that the wholesale division, in contradistinction to the Import division, had its own personnel, its own book-keeping system, its own——

Mr. tum Suden: I object to that. You are not cross-examining, are you? I want to have it now stipulated that this examination of Mr. Jaburg is by way of cross-examination, you understand that.

Mr. Jacobs (Continuing): ——license, its own sales force, its own bank account, at least on the books, different from that of the Import division, which also had its own personnel, its own sales representatives, its records and bank accounts?

A. That is correct.

2. Q. On direct cross-examination you were asked whether the present Import division, known as Carillon, had the same products as you had in 1942 and you said “yes”—did you take into account in your answer the question of Harwood?

(Deposition of Hugo F. Jaburg.)

A. I did not, because Harwood whiskey only became an item for the Carillon Importers in September, 1947. Up to that time it was handled by the wholesale division.

3. Q. Up to 1947 it was not handled any way?

A. We did not acquire that brand until 1944.

4. Q. In connection with Mr. Ravaud's functions—did he hold any other position with R. C. Williams, official or otherwise, other than general manager, no matter in what name?

A. He did not.

5. Q. Did he have any power of attorney or authority from R. C. Williams & Co., Inc., to bind R. C. Williams & Co., Inc., in any way other than through the Import division under your instructions? A. He did not. [12]

6. Q. In working out the Harwood arrangement did you personally participate in all the negotiations leading up to the agreement?

A. I did not.

Mr. tum Suden: Agreement between whom?

A. The distiller and R. C. Williams & Co.

7. Q. Your answer is?

A. I did not.

8. Q. Do you recall any of the details outside of the general ones provided for in the Harwood agreement?

A. That was left entirely in the hands of Mr. Koerner, who was in charge of that item.

9. Q. You do not know whether R. C. Williams & Co. accepted an order or did not?

(Deposition of Hugo F. Jaburg.)

A. I do not.

By Mr. tum Suden:

10. Q. The Carillon Importers is a recently formed corporation? A. That is right.

11. Q. It took over the Import division of R. C. Williams?

A. It took over the items that were there then and has since acquired other items.

12. Q. That include Harwood?

A. Harwood was not in the Import division at any time until Carillon Importers was formed as a separate corporation. In fact this was done at the request of the distiller who did not want Harwood in the regular R. C. Williams import division.

13. Q. Prior to that time R. C. Williams accepted the orders on behalf of the distillery?

A. I do not know the exact procedure.

14. Q. What compensation did R. C. Williams get for handling these transactions?

A. As I recall it we were to receive compensation of \$1.50 per case out of which we had to pay brokerage fees to the various brokers appointed by the distiller.

15. Q. This \$1.50—are you sure it is \$1.50 a case?

A. I do not recall the exact figure and I am not quite positive of whether it was \$1.50 or less. [13]

16. Q. Is it not a fact that R. C. Williams paid the distillery a certain sum for a case and sold it to the distributors or in Mr. Fog's territory for an additional sum and does not represent the \$1.50?

(Deposition of Hugo F. Jaburg.)

A. I do not recall the exact procedure without reference to the files. All I know is that it was far less than a normal profit item would bear, it was handled entirely differently.

17. Q. Your profit on the sale of this would be \$1.50 a case?

A. Less, we had to pay commissions.

18. Q. Who did you pay the commissions to?

A. To certain brokers appointed by the distiller.

19. Q. These brokers made sales for R. C. Williams?

A. I do not remember the exact procedure.

Mr. Jacobs: The figure should be \$1.60, I'll show you. Mr. Jaburg, did you entrust the drawing of the special Harwood agreement between the distillery and R. C. Williams to me? A. I did.

Mr. Jacobs: And if I told you the amount was \$1.60 per case and \$.60 was to be paid to the brokers appointed by the distillery, would you say that was correct? A. I would.

By Mr. tum Suden:

Q. Have you a copy of the agreement between R. C. Williams and the distillery?

Mr. Jacobs: Not with me.

Q. Could you get one for me?

Mr. Jacobs: Sure.

Q. Will you send me a copy?

Mr. Jacobs: I will be glad to.

/s/ HUGO F. JABURG. [14]

(Deposition.)

MR. JEAN RAVAUD

being first duly sworn:

By Mr. tum Suden:

1. Q. Mr. Ravaud, you are Jean Ravaud and are employed by R. C. Williams Co.?

A. I am not employed by R. C. Williams Company. I am general manager of Carillon Importers, Ltd.

2. Q. Referring back to 1942, were you then employed by R. C. Williams?

A. As general manager first of the Continental Importers, 610 Fifth Avenue, New York City, and as general manager of Williams Importers, same address.

3. Q. You reside in New York?

A. I reside in Verdi, Nevada, and for the moment in New York City.

4. Q. You are nevertheless an employee of R. C. Williams?

A. I am not—I am an employee of Carillon Importers, Ltd.

5. Q. In 1942?

A. In 1942 I was an employee of R. C. Williams.

6. Q. R. C. Williams Co. paid your salary?

A. I was paid by separate bank account of the division.

7. Q. That was from funds of R. C. Williams, was it not? A. Well——

8. Q. It was Continental Importers, was it not?

(Deposition of Jean Ravaud.)

A. It was a division, separate bank accounts, with the proceeds of the sales of the division.

9. Q. These proceeds belonged to R. C. Williams & Co.? A. Yes.

10. Q. You know Mr. Ove Fog?

A. I do.

11. Q. When did you first meet Mr. Fog?

A. I believe it was in 1942.

12. Q. Under what circumstances?

A. At the time we were looking for a western division manager and Mr. Fog was recommended to me and I went to San Francisco to see him.

13. Q. Prior to going to San Francisco you corresponded with him?

A. Just a letter and arranging the necessary appointment. [15]

14. Q. Did you proceed to San Francisco?

A. I did.

15. Q. Do you remember the date?

A. Exactly I do not remember, but I believe in 1942.

16. Q. Early part?

A. The Spring, I think, of 1942.

17. Q. Did you discuss his employment with him? A. I did.

18. Q. Did it ultimately result in your employing him?

A. I decided the principal of the terms and conditions of his employment. I had to refer to the president, Mr. Jaburg.

(Deposition of Jean Ravaud.)

19. Q. I beg your pardon—did you tell Mr. Fog you would have to refer him to Mr. Jaburg?

A. I believe I did tell him that as far as I was concerned it was a deal, but I had to take up the matter in New York.

20. Q. Did you confirm that later?

A. I think it was a letter to Mr. Fog. It was not a contract, it was a letter submitting the terms and conditions of his employment.

21. Q. You sent him a letter submitting the terms and conditions of his employment?

A. I believe I did.

22. Q. Do you have a copy of that letter?

A. I believe it is in the file.

23. Q. Do you have it here?

(Mr. Ravaud refers to file.)

A. To be exact I do not remember whether it was a letter sent to Mr. Fog or an inter-office memo to Mr. Jaburg that I sent to the accounting department and also to Mr. Fog. I do not remember exactly how it was handled.

24. Q. Would it be possible for you to secure a copy of that letter?

A. I believe so. If we don't have it, I believe it was a memorandum.

25. Q. It is a fact, is it not, that maybe you did not send such a letter?

A. I don't remember whether it was a letter or an inter-office memorandum for us and a copy to Mr. Fog. I know something was written. [16]

(Deposition of Jean Ravaud.)

26. Q. You know you wrote him something about something?

A. I remember it was a schedule of commissions.

27. Q. When you interviewed Mr. Fog in San Francisco what representations did you make to him relative to the products to be handled?

A. At the time I told Mr. Fog it was to handle the products handled by Continental at that time and submitted to Mr. Fog the items which were were handling at Continental.

28. Q. Did you discuss with him the future plans of Continental?

A. I told him we hoped for additional products, it was at the time—it was the start of our new division and I remember telling him that I hoped we would have additional products.

29. Q. Did you advise him that the Continental Importers were handling or in charge of all the imported products of R. C. Williams Company?

A. At the time, yes—at the time we were.

30. Q. What other liquors were imported and distributed by Williams at that time, were in the Continental Importers division?

A. I don't know all of them.

31. Q. What ones were excepted?

A. Two items—a Greek brandy—which was handled by the wholesale division.

32. Q. For metropolitan New York?

A. No, for all over the country.

33. Q. Terms?

(Deposition of Jean Ravaud.)

A. Not on a distributor basis—it was a product not available here on account of the war and R. C. Williams was distributing what was left. Other miscellaneous items I really do not recall what they were, which were special importations of R. C. Williams.

34. Q. You represented to him then that in addition to the products that you mentioned at the time that you had hopes of increasing the list of products for national distribution?

A. Yes, I did.

35. Q. Did you at that time picture to him the proceeds of that division and the possibility of his commissions?

A. I do not recall. I remember that with what we had to sell at the time, in 1942, of course his income would not be spectacular, but we had a long range in the future as we got new agencies. [17]

36. Q. Did you assure him that R. C. Williams would not ship into his territory except through Continental?

A. When we discussed the terms—not at that time.

37. Q. You didn't give him any such assurances?

A. Not at that time, when we made the terms of his employment.

38. Q. Any time during the time of his employment?

A. I mentioned it once. I think it was after a shipment of rum to San Francisco and I told or

(Deposition of Jean Ravaud.)

I wrote to Mr. Fog that would not happen again and if I recall what I told him, it was because we did not want any item in competition with our products sold in the west coast and I realized that it was in competition to our sales of another rum which we had the agency for in America.

39. Q. That shipment was sent out by R. C. Williams and not through the Continental Importers?

A. The rum shipment—it was shipped by us for one of our distributors as an accommodation.

40. Q. Mr. Fog objected to that procedure, did he not?

A. Yes he did and he called my attention to that shipment to San Francisco.

41. Q. It was in violation of your understanding with him?

A. When Mr. Fog advised me of this shipment to San Francisco it was not in relation with his agreement. He just called my attention to the fact that it was detrimental to our merchandising policy.

42. Q. And you assured him that would not happen again? A. I did.

43. Q. That was prior to the time that R. C. Williams handled Harwood whiskey?

A. Yes.

44. Q. That was in 1943? A. 1943.

45. Q. What were the provisions of this oral agreement that you had with Mr. Fog when you first employed him?

(Deposition of Jean Ravaud.)

A. He had a nominal salary of, I believe, \$4200 a year plus a commission on a per case basis on a progressive scale plus part of his traveling expenses. [18]

46. Q. That per case scale was to be applied on all liquors sold in his territory by Continental?

A. For the submitted items of Continental Import division.

47. Q. And also in connection with any additional products?

A. Not for the entire products. We decided the principal of the commission and the amount of that commission was to be determined, and if possible included in that same chart or scale of progressive commissions. As a matter of fact, we had another product in the meantime, a year after, I think, which was lemon extract for which a commission was decided because it was a new item and that commission was a new commission. I know the commission had nothing to do with the commission paid on the liquor.

48. Q. It was a separate item? A. Yes.

49. Q. The same principal would apply, would it not, if you sent out—say coffee?

A. Certainly, the same principal applies. If it would have been another spirit none on which the commission could be determined on a per case basis.

50. Q. That did not apply on cordials, wines and liquors?

A. Yes—none on a per case basis and the com-

(Deposition of Jean Ravaud.)

mission would have varied according to the type of merchandise and the margin of profit of our division.

51. Q. If a new cordial was added and handled in that territory that would have the per case commission applied to it? A. Yes, it would.

52. Q. Do you recall when Harwood whiskey was first sent out to the coast?

A. I do not remember. I think it was 1944. I really do not remember the date. As a matter of fact I knew nothing of the transactions of R. C. Williams with Harwood.

53. Q. You know nothing about that?

A. The only thing I know that is that once in a while to accommodate a customer I asked Mr. Koerner if he could not have some whiskey shipped to a particular distributor, wherever he was, and very often I could not get satisfaction.

54. Q. In the placing of orders?

A. In the acceptance of orders. He could not accept orders even suggested by me because it was the privilege of the distiller. [19]

55. Q. Whether or not he only filled the orders? A. That is right.

56. Q. Did you ever have any discussions with Mr. Fog relative to his commissions on Harwood whiskey?

A. Well, I did not discuss the question of commission with Mr. Fog, because Mr. Fog brought up the matter a few times when he saw that some Har-

(Deposition of Jean Ravaud.)

wood was shipped by the distributor to his territory. We discussed Harwood but not the commission. Mr. Fog told me a number of times that he would like to have helped a few of his distributors in getting them some Harwood. I remember that on two or three occasions—one was a distributor in Nevada—as an accommodation I tried to get some whiskey from Mr. Koerner. Mr. Fog's demands were exclusively to help our distributors and the matter of commissions was not mentioned. We mentioned it in 1945 and I told Mr. Fog that we had nothing to do with Harwood, that Harwood was entirely handled by R. C. Williams, 265 Tenth Avenue, and our division had nothing to do with it and I pointed out to him that even our salesmen could not handle Harwood as Harwood was sold through brokers appointed by the distributor in Canada.

57. Q. Could you give me the name of any broker who handled it in his territory?

A. The name of the brokers handling on the coast? I think we mentioned the names of brokers handling Harwood.

58. Q. Can you give me names of any brokers who handled Harwood whiskey in Mr. Fog's territory?

A. I think—I really don't know. I do not follow that.

59. Q. You do not know the brokers?

A. I do not have that at all.

60. Q. What do you base your information on?

(Deposition of Jean Ravaud.)

A. I know a few of them—none on the coast. In my conversations with Mr. Koerner I had been told a few times or I was asking him for information about the merchandising policy of Harwood and I was told by him that the brokers in different territories were appointed by the distillery and they were paid by R. C. Williams out of the gross profit of R. C. Williams.

61. Q. That gross profit, I think, was stated at \$1.60 a case?

A. Personally I do not know. I have never seen the contract or agreement of contract between R. C. Williams and the distillery. I cannot answer that.

62. Q. You cannot tell us how these transactions were handled? You know nothing about that?

A. Nothing—I know all the shipments were made by the distillery and never by R. C. Williams?

63. Q. The shipments?

A. Yes, everything was direct.

64. Q. R. C. Williams did not warehouse the liquor and ship it out? A. That is right.

65. Q. They handled the distribution?

A. That is right, with the exception of New York.

66. Q. You handled it direct there?

A. That is right.

67. Q. Did you not assure Mr. Fog that all shipments of liquor into his territory would go through Continental Importers?

A. The only time I mentioned or wrote, I do not

(Deposition of Jean Ravaud.)

recall, to Mr. Fog about this matter was in reference to that rum shipment which I mentioned before.

68. Q. That is the only time?

A. The only time I mentioned it or wrote.

69. Q. You cannot recall any assurances verbally or otherwise? A. No.

70. Q. Did Mr. Fog in 1945 discuss with you his claim for commissions on Harwood?

A. He did.

71. Q. What was that discussion?

A. The discussion was, I think it was in New York, or Mr. Fog came to New York in 1945, the early part of 1945 and Mr. Fog—first Mr. Fog wrote me a letter about it saying that he felt he was entitled to a commission because it was his territory. I believe I wrote back to Mr. Fog that I did not understand his claim because I explained to him time and time again that the import division of Williams Importers had nothing to do with the import and sale of Harwood.

72. Q. Williams or Continental?

A. Williams at the time and that therefore as he was employed by Williams Importers, which in fact was an entirely different organization, he was not entitled to any commission. I think that Mr. Fog then came to New York a couple of months or a few weeks later and discussed the matter again. [21]

73. Q. With you personally?

A. Personally and I think also with Mr. Jaburg, and in a couple of conferences, without recognizing

(Deposition of Jean Ravaud.)

the claim of Mr. Fog, he almost as a gesture, because we wanted him to go back to the coast with the right frame of mind, we decided to give him the sum of \$10,000.

74. Q. That was in New York?

A. I don't remember if we gave him the \$10,000 or we sent it to him.

75. Q. That was a gesture of good will?

A. Yes, he had a kind of bitter taste in his mouth because of the Harwood in California.

76. Q. That was not a payment on account of his commissions?

A. No, nothing to do with commissions.

77. Q. Was that the last transaction you had with Mr. Fog relative to commissions on Harwood?

A. That is all.

78. Q. Did you have any conversation in San Francisco with him about commissions on Harwood?

A. No, prior to that when I just explained to him about the conferences here and his claim for commissions, but after that I believe I wrote a letter to Mr. Fog which Mr. Fog signed and we never spoke about Harwood. The only time was when Mr. Fog, to accommodate a customer or two asked if it were possible to get a few cases.

79. Q. Did you at any time in the interval in the time he was paid the \$10,000 assure him that R. C. Williams would not ship any products except through Continental? A. No.

80. Q. Did you do that subsequent to that time?

A. No, I did not.

(Deposition of Jean Ravaud.)

81. Q. Did you handle all the questions relative to Mr. Fog's commissions yourself or did you refer it to anyone else?

A. You speak about the payment?

82. Q. His claim or request for a commission on Harwood?

A. I did not decide myself. That was discussed with Mr. Jayburg, I believe. I am sure it was Mr. Jayburg and the other directors of the company.

83. Q. Nobody else handled that question with Mr. Fog?

A. I do not believe so. I don't know who would have discussed it with him. [22]

84. Q. Do you know a man by the name of Ackerman?

A. Oh, yes, Ackerman. Mr. Ackerman was my sales manager and he did not handle any question of commission on Harwood. If my recollection is right, he corresponded regarding getting them half a car of Harwood. That correspondence was, I think, between Mr. Ackerman and Mr. Fog.

85. Q. Mr. Ackerman had nothing to do with the question of commission?

A. Absolutely nothing.

86. Q. He was your general sales manager?

A. He was our sales manager.

87. Q. For the Import division?

A. Exclusively for the Import division. I don't know if he discussed the matter of the commission with Mr. Fog, but I can say that he had no authority at all to discuss such matters.

(Deposition of Jean Ravaud.)

88. Q. Mr. Ackerman?

A. Yes, Mr. Ackerman—all questions of compensation of any kind—that was my responsibility.

89. Q. When was Mr. Ackerman your general sales manager, what period?

A. From 1944, I believe, to 1947, to the summer of 1947.

90. Q. He is still in your employ?

A. No.

91. Q. Do you know where he is now?

A. I think he is in the middle west somewhere.

92. Q. He does not represent R. C. Williams?

A. He never represented R. C. Williams. He is no longer with the firm in any capacity.

By Mr. Jacobs:

1. Q. In phrasing a question, Mr. tum Suden said, as closely as I recall “the \$10,000 was not a payment on account of commissions,” and as I recall it, your answer was “no, it was not”—is it not a fact that the \$10,000, while not being a payment for commissions, was in satisfaction for any possible claim for such commissions that Mr. Fog might have or might claim to have in the future?

A. Yes.

2. Q. In connection with your statement about Mr. Ackerman, do you actually know what Mr. Ackerman wrote to Mr. Fog and do you actually know of your own knowledge what conversation he might have had with Mr. Fog? [23]

A. I don't know about conversations—I remem-

(Deposition of Jean Ravaud.)

ber letters written by Mr. Ackerman to Mr. Fog mentioning very clearly or confirming what I said to Mr. Fog that our division had nothing to do with the import of Harwood and we were not financially interested in Harwood.

3. Q. Would you say that Mr. Ackerman did not discuss the question of commissions, but had no authority? A. He had no authority.

4. Q. The letters you saw in the file, purportedly written by Mr. Ackerman, were letters based on your discussion with Mr. Ackerman of the question of Mr. Fog? A. I believe so.

5. Q. You are not sure of all the letters that **Mr. Ackerman** might have written?

A. No, I did not see all of the letters.

6. Q. You saw some of them?

A. I did.

7. Q. Did you not turn over the question of Mr. Fog's commissions to Mr. Ackerman?

A. No, I did not, not the question of commissions. My correspondence was with Mr. Fog. He saw most of the letters I wrote to Mr. Fog and the letter written by Mr. Fog to me.

By Mr. Fog:

Q. Is it not, Mr. Ravaud, a fact that you told me at one time in New York that you had turned over to Mr. Ackerman all the dealings as to information regarding Harwood whiskey on your behalf?

A. Yes and no. At the time, it was in 1945, and

(Deposition of Jean Ravaud.)

I was leaving with Mr. Jaburg for France and whenever you have any question about Harwood. As I said here, when I left, I told Mr. Fog—if you want to know anything about Harwood ask Mr. Ackerman, who in turn would ask Mr. Koerner.

/s/ JEAN RAVAUD.

[Endorsed]: Filed DC Dec. 17, 1948.

[Endorsed]: Filed CCA May 19, 1949. [24]

In the Southern Division of the United States District Court for the Northern District of California

No. 28,121-G

OVE FOG,

Plaintiff,

vs.

R. C. WILLIAMS & COMPANY, INC.,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Tuesday, December 28, 1948

Appearances:

For Plaintiff: Richard tum Suden, Esq.

For Defendant: James Farragher, Esq.

The Clerk: Fog vs. Williams & Company.

Mr. tum Suden: Ready.

Mr. Farraher: Ready.

Mr. tum Suden: If the Court pleases, I do not know whether you are familiar with the pleadings, or not, in this case, but this action is one on a claim for commissions claimed by the plaintiff to have been owing to him under an agreement whereby he was appointed the Western Division Manager of R. C. Williams & Company, Continental Import Division. The Continental Import Division is a division of R. C. Williams & Company, the defendant in this action. It is not an indeepndent corporation, but is just a department.

Briefly, the plaintiff, Ove Fog, was engaged to be the Western Division Manager for the Continental Import Division of R. C. Williams. He was employed by a representative of R. C. Williams, Jean Ravaud, who sought him out, and made a verbal agreement relative to his employment. It was agreed that he was to have a certain salary plus an override or commissions on the amount of liquor shipped and sold in the territory.

At that time, at the time the contract was entered into, the Williams Company had certain lines which it was a national distributor for, and it created the department to take care of the national distribution. It also was contemplated that additional lines would be secured and a large department built up.

Then it so happened subsequent to the employment of Mr. Fog that a brand of whisky known as Harwood came into the market and bottles were

labeled "Imported by R. C. Williams & Company." Then a controversy arose as to whether or not Mr. Fog was entitled to commission on the sale of this liquor which appeared [2*] in the territory, it being Mr. Fog's contention (and we will support that by evidence) that no liquors were to be shipped into this territory by R. C. Williams except through Continental Import Division. In response to his inquiries and requests for commissions, he was advised that R. C. Williams & Company had nothing to do with the sales of this liquor and did not handle it, that it simply cleared it for the distillery, a Canadian corporation, as an accommodation, because of the fact that R. C. Williams & Company had the wholesale distribution of the Harwood whisky in the metropolitan New York area.

It developed later that some sort of a compromise or adjustment was made, whereby R. C. Williams & Company paid Mr. Fog the sum of \$10,000 under certain circumstances which we will have to develop during the course of the trial, there being two different versions of the payment of this money: One was, as claimed by some of the representatives of the defendant, that it was simply as a matter of good will, and again in a memorandum which they prepared, as a settlement of his claim for commissions on the Harwood whisky. Whichever way it was, the basis for the payment of this money and for the relinquishment of Mr. Fog's claim for commissions, we contend, were based upon misrepresenta-

* Page numbering appearing at top of page of original Reporter's Transcript.

tions, and that by reason thereof Mr. Fog was entitled to have that so-called agreement set aside, and he would be entitled to the commissions on the number of cases which had been shipped into [3] this territory by R. C. Williams. Briefly, the number of cases admitted by the defendant in the answer was somewheres around 500,000 cases covering the period involved here. We request that judgment should be given in favor of the plaintiff and that, if necessary, a master be appointed to make an accounting to determine the exact number. That is the position of the plaintiff in the action, if the Court pleases.

Mr. Farraher: May I make a brief statement of our position, if your Honor please? The plaintiff, as your Honor doubtless has observed, alleges that there was a dispute over these commissions that had been going on for some months, and a settlement was made in writing of that dispute. The complaint in that regard says that on March 8, 1946, after repeated statements by defendant, that it had not and was not handling the importation into or sale of Harwood whisky in plaintiff's territory, was not receiving any compensation for the sale of such whisky in said territory, the defendant, relying upon those representations, accepted \$10,000 in settlement.

He then seeks to avoid that settlement by the allegation that he did not know that Williams & Company had anything to do with the sale of Harwood whisky in this territory, and furthermore that

he had no knowledge that they were receiving any compensation for handling Harwood whisky until he discovered it in January, 1948. [4]

We expect to prove, if your Honor please, that for pretty near two years prior to the settlement there was a continual flow of correspondence between this plaintiff and the head of his organization, a Mr. Ravaud, with reference to the sale of Harwood whisky in this territory. We will offer to show that repeatedly he was calling attention to the fact that this person or that person got Harwood whisky, and that they wanted the whisky to come to the customers of this division of which the plaintiff was the president. We will also show by correspondence, both of the plaintiff and the defendants, that he was advised that they were making \$1 a case on this whisky all of the time, and with that complete knowledge of all those facts, that he made the settlement in March, 1946. We will also show that at that time a new contract was entered into, this time a written contract, which eliminated any reference to Harwood, specifically limited the business to the business done by the division, of which the plaintiff was a member, that that contract was signed, that in the following March, 1947, the plaintiff resigned, and at the time he resigned he accepted additional pay of \$10,000 again, and in doing so he released the plaintiff from all claims of any kind for the past or future.

We submit, if your Honor please, the evidence will show that the settlement was made and that

there was no ground existing which would permit the court to set it aside. [5]

Mr. tum Suden: I might state one further fact, if your Honor please, which we will show, and that is the discovery of these misrepresentations was caused by the fact that the Bureau of Internal Revenue, the Alcoholic Division, subpoenaed Mr. Fog relative to the sale of Harwood whisky in the United States, involving another case, and at that time he ascertained that R. C. Williams & Company actually did buy and import the Harwood whisky in this country and did sell it in this territory contrary to their representations to him continually throughout the entire period.

The first witness I will call will be Mr. Fog, if the Court please.

OVE FOG,

the plaintiff herein, was called as a witness on his own behalf, and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. Ove Fog.

Direct Examination

By Mr. tum Suden:

Q. Mr. Fog, you are Ove Fog, the plaintiff in this action? A. I am.

Q. You are a resident of the City and County of San Francisco? A. I am.

Q. How long have you been a resident of the

(Testimony of Ove Fog.)

City and County of [6] San Francisco?

A. About 15 years.

Q. About 15 years? A. About.

Q. You are a naturalized citizen?

A. I am.

Q. Born in Denmark?

A. Born in Denmark.

Q. When did you come to the United States?

A. I think in 1926.

Q. 1926? A. Yes.

Q. Referring to the year 1941, what was your business?

A. In 1941, in the latter part of 1941, I was employed by Schenley Distillers, heading one of their divisions.

Q. In connection with the sale of their products?

A. In connection with the sale and promotion of their products.

Q. Did that continue into the year 1942?

A. Yes, that continued until I asked to be released from that position to take over a position that was offered to me by R. C. Williams & Company.

Q. How did you first become acquainted with the firm of R. C. Williams?

A. I received a letter, I believe, some time in March from William Williams, Importers, a division of R. C. Williams, in [7] which Mr. Ravaud asked me whether I was in a position to consider another position.

(Testimony of Ove Fog.)

Q. I will show you a letter dated March 26, 1942, addressed to you from Continental Import Division of R. C. Williams, signed by Jean Ravaud, and ask you if this is the letter which you just referred to?

A. Yes, that is the letter.

Mr. tum Suden: Does the Court want me to read this letter?

The Court: Is there any point in putting it into the record?

Mr. tum Suden: I want to show how Mr. Fog was employed, the negotiations leading up to his employment and the representations made at that time, because that is the basis of his employment.

The Court: Is there any dispute about the employment?

Mr. Farraher: There is no dispute about the employment at all, if your Honor please. I was making no objections. I thought it might be preliminary to something, but it would seem to me the question of his employment could not arise until it is shown that the settlement that was made was a furtive settlement. If the settlement was made, it does not make any difference what his contract was.

The Court: I glanced at the complaint and answer and it does not seem to me there was any dispute about the fact that the plaintiff was in the employ or had a business relationship with the defendant. [8]

Mr. Farraher: That is right. It is admitted in the pleadings.

(Testimony of Ove Fog.)

Mr. tum Suden: I want to bring out the terms of his employment, if the Court please.

The Court: Is that disputed?

Mr. tum Suden: Yes, that is disputed.

Mr. Farraher: I do not want to be too strict in my objections, but it occurs to me inasmuch as they have alleged a settlement and asked the Court to set aside the settlement, they would first have to establish that that is a void settlement. If that is a valid settlement, it doesn't make any difference what the history of this man's employment was.

The Court: I think there is an admission in the answer of the terms of employment, the compensation, isn't there?

Mr. Farraher: That is true.

Mr. tum Suden: The question that is in issue, if the Court pleases, is the fact that when Mr. Fog was employed, he was told by Mr. Ravaud, who came out here to employ him, the conditions of his employment. There was nothing in writing. It was an oral agreement, and one of the conditions which is in dispute affects the sale of Hardwood whisky in this territory, that is, no merchandise would be shipped into this territory by R. C. Williams except through the offices of the Continental Import, of which Mr. Fog was the manager, and upon all of those shipments he would receive his commissions. Then it turns out that they [9] did ship Harwood whisky into this territory, but they did not ship it through the Continental Import Division, but

(Testimony of Ove Fog.)

claimed they had nothing to do with the sales, that the distillery handled the sales: therefore they had nothing to do with the sales. They made no money on it.

The Court: You are in dispute on this point: You claim the plaintiff was to receive compensation on all goods shipped into this territory by the defendant whereas the defendant claims that that agreement only covered merchandise that was shipped in by the so-called Continental Import Division?

Mr. tum Suden: Through the Continental Import.

The Court: Is that in issue?

Mr. Farraher: That is in issue, and if that is the purpose, the purpose stated by Mr. tum Suden removes my objection.

Mr. tum Suden: I do not think there is any issue as to his actual employment, but the terms of his employment. This is preliminary. I will withdraw this exhibit unless the Court desires it.

Q. Mr. Fog, after some correspondence you were approached by Mr. Ravaud?

A. Yes, a few weeks later I received a letter from Mr. Ravaud advising me that he intended to make a trip out to the Coast here to meet me and talk over matters.

Q. Did he come to San Francisco?

A. Yes, Mr. Ravaud came to San Francisco. [10]

Q. Did you meet him? A. Yes.

(Testimony of Ove Fog.)

Q. Where did you meet him?

A. I met him at the St. Francis Hotel.

Q. Was anybody else present? A. No.

Q. Just the two of you? A. Yes.

Q. What was the subject of that conversation or did you hold any conversation?

A. Yes, we had quite a long conversation. Mr. Ravaud told me that he came from New York, from R. C. Williams & Company and that they had created a division called Continental Import Division, for which he was the general manager. This division was formed for the purpose of taking care of R. C. Williams national sales. So that Your Honor would understand what that means in this instance, I must mention that R. C. Williams, prior to the forming of the Continental Import, was doing liquor business through a liquor department, which was a wholesale liquor department, and this department took care of their metropolitan New York business. Besides that, I understand they also had——

Mr. Farraher: If Your Honor please, we object to this witness testifying what he understands the corporation does.

The Court: You will have to limit it to his conversation. [11]

Q. (By Mr. tum Suden): Repeat the conversation so far as you can between you and Mr. Ravaud relative to your employment.

A. Yes, sir. Well, my statements that are made refer to what Mr. Ravaud told me.

(Testimony of Ove Fog.)

Q. He explained to you the setup of the R. C. Williams liquor division and so on?

A Yes, sir, that is what I was referring to here. Mr. Ravaud explained to me that the wholesale liquor division of R. C. Williams was taken care of in the metropolitan New York business, and that the Continental Import Division was to take care of R. C. Williams national distribution for whatever agency they already had or whatever agency they might get in the future. That was the distinction between those two departments of R. C. Williams & Company.

Mr. Ravaud furthermore told me that, of course, in the beginning they had only a few lines, but they expected to get very important lines, and then the Continental Import Division would be the leading house in that field in the United States because R. C. Williams & Company was an old house, and through that old house and due to the fact that they were well known they would be able to secure good lines as time went on.

Q. Did he make any arrangement with you as to compensation?

A. With reference to my compensation, Mr. Ravaud asked me what I had in mind, whether I was in favor of a set salary or whether I would prefer a small guarantee and a commission. I told Mr. Ravaud that I was in favor of receiving a small guarantee and then a commission on all merchandise that went out from my territory, based on the

(Testimony of Ove Fog.)

fact that I saw the import of R. C. Williams & Company and what that house stood for; such an arrangement for me should open great possibilities, and then, of course, I depended on my own abilities to do a good job.

Q. You had been in the liquor business how many years?

A. I had been in the liquor business since Prohibition. I was in the early—just after Prohibition.

The Court: I think he has answered the question, but he still did not answer your question as to what the conversation was.

Q. (By Mr. tum Suden): What arrangements did you make about compensation? You only started in on that.

A. When we started in, the guarantee was set, the small guarantee was set at that time—I think it was \$4,200 or something like that—and then Mr. Ravaud wanted a little time to set up the schedule for the commission I was to receive for whatever business I did in my territory which, of course, was the most important part of the income I was looking forward to receiving. The guarantee was a minimum.

Q. Was any amount of your override fixed at the time you spoke to Mr. Ravaud?

A. No, sir, Mr. Ravaud said that it was impossible for him at that time to give me that schedule but he would go back to New [13] York and he

(Testimony of Ove Fog.)

would refer to it and come back and have it straightened up.

Q. Did you agree with Mr. Ravaud then as to whether or not you were to be employed?

A. Yes, Mr. Ravaud then employed me, and if it was possible for me to be released from my position with Schenley on account of the short notice, he would like me to start on the first of May, which was about eight days ahead. And I told Mr. Ravaud I thought they would release me, which they did.

Q. And you immediately went into the affair as Western Division Manager of Continental Import?

A. Yes, commencing May 1, 1942.

Q. Did you communicate subsequent to that time with Mr. Ravaud relative to your arrangement for commissions?

A. Yes, in, I believe it was, in the very latter part of 1942 I wrote to Mr. Ravaud and asked him if he would be good enough to set up the schedule for my commissions, and Mr. Ravaud called me back and told me that he would work on it and come back to this matter very shortly.

(Mr. tum Suden handed a document to Mr. Farraher.)

Mr. Farraher: No objection.

Q. (By Mr. tum Suden): Mr. Fog, I show you——

The Court: If counsel does not object to it, you do not have to identify it. Is there something you want to call my attention to? [14]

(Testimony of Ove Fog.)

Mr. tum Suden: Yes.

The Court: State the substance of it.

Mr. tum Suden: One of the letters is from Mr. Fog to Mr. Ravaud dated September 21, 1942, making inquiry as to his decision on the question of override, and he received a response to that letter on September 25, 1942. The substance of it is, if that is what the Court wants me to do, that he had been giving the matter consideration and he would communicate with Mr. Fog in a few days, and he expected to be out on the Coast, and at this time he would take up that question. But there is one paragraph here which I would like to read to the Court. It has a bearing on sustaining Mr. Fog's testimony:

“I want you to know how satisfied I am with your work on the Coast. I know the difficulties which you are facing, but I believe, and I am sure you do, that before long we are going to be one of the main factors in the liquor industry. I also want you to know that my organization is going to become bigger with the addition of outstanding agencies. As soon as the volume of business will warrant a larger sales organization, it is my intention to give you more territory to supervise and to let you have the number of missionary men and representatives which our business will then justify.”

Mr. tum Suden: I might offer these in evidence, if the Court please. [15]

The Court: Very well.

(Testimony of Ove Fog.)

(The documents referred to were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits Nos. 1 and 2.)

PLAINTIFF'S EXHIBIT No. 1

[Letterhead]

Continental Import Division
of R. C. Williams & Co., Inc.

September 25, 1942.

Mr. Ove Fog
c/o Parrott & Co.
1929 S. Figueroa Street
Los Angeles, Calif.

Dear Mr. Fog:—

I have received your personal note of September 21st, regarding your own situation, and I perfectly understand your viewpoint.

It is definitely my intention to improve your position with us, and to see that you are adequately compensated for your efforts. I would like to **confirm our gentlemen's** agreement, and you will receive a progressive bonus, which will be a personal inducement for you to better the business in your **territory**.

To be perfectly frank with you, I have to study a possible schedule, and as you know, at this time I am terribly busy with our organization. Therefore, I am asking you to wait a few days, until I

(Testimony of Ove Fog.)

have a chance to concentrate on the subject, and also to consult with my associate.

As far as you and I being protected in our commitments, on account of the possibility of wages being frozen by Washington, you do not have to worry about this. This letter is enough to cover whatever arrangement we will make in the near future.

I want you to know how satisfied I am with your work on the Coast. I know the difficulties which you are facing, but I believe, and I am sure you do, that before long, we are going to be one of the main factors in the liquor industry. I also want you to know that my organization is going to become bigger, with the addition of outstanding agencies. As soon as the volume of business will warrant a larger sales organization, it is my intention to give you more territory to supervise and to let you have the number of missionary men and representatives which our business will then justify.

As soon as we are ready to make shipments of Puerto Rican Rum, I intend to make a trip to the Coast and to see you in San Francisco or in Los Angeles. At this time, I will tell you what I have in mind for you.

Kind regards.

Very truly yours,

By /s/ JEAN RAVAUD,

jr/b

General Manager.

[Endorsed]: Filed Dec. 28, 1948.

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 2

R. C. Williams & Co., Inc.
Continental Import Division
610 Fifth Avenue
New York

Los Angeles, Calif.
September 21, 1942

Memo to: Mr. Jean Ravaud

From: Ove Fog

Now that I have successfully completed the Vodka deal, I have had time to give certain personal matters consideration. The matter I would like to take up with you refers to our gentlemen's agreement that we verbally made during your few days in San Francisco.

As far as I am concerned, and my actions have shown this, I believe, our gentlemen's agreement is of more value to me than a written document, but what I am referring to is that the salary ceilings might interfere with your very best intentions, as long as you have not established a record or agreement.

I am not interested in any change in our stipulated agreement on my salary, but it is of vital importance to me to have a definite arrangement regarding my over-ride on the volume of cases I am doing in my territory, as the income derived from this source is what makes my arrangement with your

(Testimony of Ove Fog.)

good firm attractive, and as it partly depends on my own efforts to be successful (which is also your success) I feel certain that you will solve this problem.

I know that you appreciate my position and I am only writing you at this time concerning this matter so that you can be protected also in your commitments.

Sincerely,

OVE FOG.

OF:er

[Endorsed]: Filed Dec. 28, 1948.

(A document was handed to Mr. Farraher.)

Mr. Farraher: We have no objection to this. We will stipulate that the figures in ink upon the face of it are in the handwriting of Mr. Ravaud.

Q. (By Mr. tum Suden): Mr. Fog, did you subsequently get a schedule of overrides from Mr. Ravaud? A. Yes.

The Court: Is that the document that you have in your hand?

Mr. tum Suden: This is the document.

The Court: You can just read it. I never spend much time on documents if attorneys agreed to them. Just read it. It saves time that way.

Q. (By Mr. tum Suden): I show you this document and ask you if that is the document you received from Mr. Ravaud.

(Testimony of Ove Fog.)

A. That is correct.

Q. Where did you get that?

A. I received that when I met Mr. Ravaud in Los Angeles.

Q. Is that your handwriting?

A. In Los Angeles I received it in November.

Q. What year? A. 1942.

Mr. tum Suden: The ink handwriting on there has been identified as that of Mr. Ravaud. There are some figures. I do not know what they mean, but from the terms, it is on the Continental Import Division of R. C. Williams & Co. letterhead, it is not dated, but it says, "Terms of commissions for Mr. Ove Fog: From 1000 to 5000 cases, ten cents a case."

Q. I assume that is 10 cents, is that right?

A. Yes.

Mr. tum Suden: "From 5,000 to 10,000 cases, 15 cents a case; from 10,000 to 15,000 cases, 20 cents a case; over 15,000 cases, 25 cents a case."

I offer this document in evidence, if the Court please.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 3

[Letterhead]

Continental Import Division
of R. C. Williams & Co., Inc.

Terms of Commissions for Mr. Ove Fog

| | |
|---------------------------------|------------|
| From 1,000 to 5,000 Cases.... | .10 a case |
| From 5,000 to 10,000 Cases.... | .15 a case |
| From 10,000 to 15,000 Cases.... | .25 a case |
| Over 15,000 Cases..... | .25 a case |

[Following figures on original exhibit in ink handwriting.]

| | |
|-------------------------|------------|
| 500 | 85 |
| 750 | 52 |
| <u>1000</u> <u>2250</u> | 170 |
| | <u>425</u> |
| | 4420 |
| | <u>250</u> |
| | 6920 |

[In Pencil]

Received Nov., 1942, in L. A., from Mr. Jean Ravaud.

[Endorsed]: Filed Dec. 28, 1948.

Q. (By Mr. tum Suden): Mr. Fog, did you have any conversations with Mr. Ravaud relative to the shipment of liquor into your territory directly by R. C. Williams during the year 1943?

(Testimony of Ove Fog.)

A. Yes, sir.

Q. What was that?

A. When Mr. Ravaud visited out here, it happened that a shipment of rum——

Mr. Farraher: I wonder if we could have the time fixed.

The Court: Yes, you had better fix the time and place.

Q. (By Mr. tum Suden): Can you fix the time and place that that transpired?

A. Well, it would be possible to get the exact date from the [17] invoice that formed the receipt for that shipment. I believe it was probably July, but I am not sure about it. But it is possible to get that exact date, if it is of any consequence.

The Court: 1943?

A. Yes.

Q. The conversation that you are now going to give us a conversation that occurred about July of 1943 after you got this invoice for rum, is that right?

A. No, this shipment I am referring to, Your Honor, there was only one shipment, and it is the date of that invoice. I do not have it.

Q. I understand. I am trying to help you fix the time. The conversation you had with this gentleman was about the time that this shipment of rum was made in July 1943?

A. Yes, that is correct.

Q. Where did you have the conversation? In Los Angeles? A. No, in San Francisco.

(Testimony of Ove Fog.)

Q. Where?

A. Either at the Palace Hotel—I believe in the Palace Hotel—or in the office at San Francisco.

Q. Just the two of you present?

A. Mr. Ravaud and myself.

Q. Now, give the conversation, if that is what you wanted.

Mr. tum Suden: Yes, Your Honor.

A. At that time I learned R. C. Williams had shipped a couple of [18] carloads of rum to a wholesaler here in San Francisco. I called to Mr. Ravaud's attention that that was a direct violation of my arrangement and my general agreement with them because all shipments that came into this territory from R. C. Williams in New York had to go through my office. Mr. Ravaud at that time told me he thought so, too, but he would have to take it up with Mr. Jaburg. Mr. Jaburg is president of R. C. Williams & Company. Mr. Ravaud said he was going back to New York and he would take that matter up with Mr. Jaburg and have it confirmed. Shortly after——

The Court: Just a minute. You have answered the question.

Q. (By Mr. tum Suden): Did you have any further conversation with Mr. Ravaud relative to the shipment of Puerto Rico rum subsequent to the one you have just related?

A. Pardon me. Would you repeat that?

(Question read.)

(Testimony of Ove Fog.)

A. Do you mean with regard to shipments on the Coast?

Q. No, in regard to this shipment of Puerto Rican rum. Was a decision arrived at with regard to that?

A. Yes, the decision was when Mr. Ravaud returned to the Coast shortly after, Mr. Ravaud told me that he had presented the matter to Mr. Jaburg, and he had confirmed that that was a mistake and that that would not happen again, and no merchandise would be shipped out here except through my office from R. C. Williams. [19]

Q. When did you first observe Harwood whisky, or when did you first learn that Harwood whisky was being distributed on the Pacific Coast?

A. In the fall of 1944.

Q. How did you learn that?

A. I learned it on the street from one of our wholesalers there, who told me that Harwood was now available here, and that it was imported by R. C. Williams & Company.

Q. Did you see any bottles at any time?

A. Yes, the next day I went out to pick up a bottle and I saw a bottle.

(Documents were handed to Mr. Farraher.)

Mr. Farraher: We have no objection to their introduction.

Q. (By Mr. tum Suden): Did you communicate with Mr. Ravaud relative to the appearance of Harwood whisky on the Pacific Coast?

(Testimony of Ove Fog.)

A. Yes, I contacted Mr. Ravaud by telephone and told him about it and I wrote to him.

Q. I show you these letters. Are those carbon copies of letters you sent to Mr. Ravaud?

A. Yes.

Mr. tum Suden: I would like to offer these two letters. One is a memorandum with a letter attached. It refers to it. This is dated October 18, 1944, and it is addressed to Mr. Ravaud, and it is a communication from Mr. Fog, characterized as an [20] inter-office correspondence. Briefly, it calls attention to the fact that the Canadian whisky is on the Coast out here and suggests, "It might be to our best interest if I handled the whisky direct just like I handle the Puerto Rican rum," and the yellow copy attached to it. There is one paragraph in there which I would like to read to the Court:

"When I talked to you about R. C. Williams & Co.'s wholesale liquor division offering merchandise out here such, for instance, as they did with the Puerto Rican rum to Millet & Co., you informed me that you had straightened that situation up and that the wholesale division would in no way whatsoever offer merchandise to the West Coast."

That was a letter addressed to Mr. Ravaud. I offer that in evidence.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 4

Inter-Office Correspondence
R. C. Williams & Co., Inc.
Continental Import Division
610 Fifth Avenue

San Francisco, Calif.

October 18, 1944.

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

I have given a copy of the attached letter concerning the Canadian Whiskey to Mr. Schumacher, as he wanted to know what I was writing you. I should like meanwhile in this letter, just as a closed message to you, to mention that in case your division is going to handle the Canadian Whiskey it might be to our best interest if I handled the whiskey direct just like I handle the Puerto Rican Rum, as this would bring Williams Importers' name to the foreground and solidify our position.

I believe it would be possible for you to do this if you took the stand that there was not enough profit to leave a commission to Parrott & Co. On the other hand we, of course, would give Parrott & Co. the first right to purchase whatever merchandise is available.

This is just a thought that came to me that you

(Testimony of Ove Fog.)

might like to take into consideration for your final decision if matters develop favorably for you.

OVE FOG.

OF:vh

San Francisco, Calif.

October 18

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

Re Canadian Whiskey Distributed by R. C. Williams & Co., Inc.

I confirm my telephone conversation with you of today and have before me a copy of Parrott & Co.'s letter of today to you confirming their wire, also of today. This letter is self-explanatory and you will understand how damaging this situation is to the prestige and policy of R. C. Williams & Co., Inc. It is not very often that Mr. R. J. Menzies takes drastic steps, but inasmuch as he has always valued R. C. Williams & Co.'s integrity very highly, I feel that this situation was quite a shock to him.

I learned early this morning that Tonkin Distributing Co. had bought one carload of this whiskey and was ready to open up letter of credit, and I also learned that Harry Tonkin—who is the manager of Levi Zentner & Co., and handles their different liquor divisions in Sacramento, Reno and Santa Rosa through Mr. Suskin, whom I know as being formerly connected with Lyons & Co. selling their

(Testimony of Ove Fog.)

domestic cordials etc. but now is free-lancing and evidently dabbling in all kinds of merchandise he can put his hands on—bought one car of whiskey with the understanding that Mr. Suskin was to receive \$1.00 per case from him as his commission, which later was cut down to 50c per case. To have R. C. Williams & Co.'s merchandise offered on the market in such a manner is, in my opinion, most detrimental to the interests of our firm.

When I talked to you about R. C. Williams & Co.'s wholesale liquor division offering merchandise out here such, for instance, as they did with the Puerto Rican Rum to Millett & Co., you informed me that you had straightened that situation up and that the wholesale division would in no way whatsoever offer merchandise to the West Coast.

From our telephone conversation, you will understand that we have the information that R. C. Williams & Co. by telephone has confirmed to the firm of The Joseph Abrams Co. and accepted the sale of four carloads of the above mentioned whiskey, and I only hope that by the time you receive this information you will be able to have this confirmation voided. I know you will understand how important it is for Parrott & Co. and for me at this time to be able to offer some whiskey to the trade for the purpose of helping us sell the rest of our lines, such as Rums and Corgo Port, which at this time as you know are hard to sell.

I feel quite sure you will appreciate my position

(Testimony of Ove Fog.)

in this matter and I shall be looking forward to hearing from you at your first opportunity.

OVE FOG.

OF:vh

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: We admit the authenticity of the document. No objection to its admission.

Q. (By Mr. tum Suden): Mr. Fog, I show you an interoffice correspondence dated October 20, 1944, from Mr. Ackerman to you and ask you if you recognize that document. A. I do.

Q. Who is Mr. George Ackerman?

A. George Ackerman was considered, I believe, assistant manager of the Continental Import, if that was his title. He was anyway [21] Mr Ravaud's assistant.

Mr. tum Suden: If the Court please, I would like to offer this document in evidence. It is an interoffice communication with an attached memorandum. I would like to read a portion of it.

The Court: Very well.

“Memorandum to Mr. Ove Fog from Mr. George M. Ackerman:

“The attached, in addition to giving you the terms and conditions of the sale of Harwood whisky, serves as the sample of a letter we propose to send to all of our distributors. If you

(Testimony of Ove Fog.)

wish me to send this letter to any of the distributors in your territory, please advise.”

And the pertinent portion is as follows:

“Several of our distributors have written to us about Harwood Canadian whisky, as R. C. Williams’ name appears on this bottle as the sole United States——” and then comes the word “distributor,” which is stricken out in ink and then word “importer” is written in in ink.

“Actually, our company has had nothing to do with the sales representation of this item. All sales were made by representatives of the distillery and at their terms. As a service to the Canadian distillery, R. C. Williams & Co., Inc., 265 Tenth Avenue, New York City, merely cleared all United States sales for them, and served as a wholesaler in New York City for this product.” [22]

And then follow the terms referring to a 30-day letter of credit and so on. I offer this document in evidence.

(The two documents referred to were thereupon received in evidence and marked Plaintiff’s Exhibit No. 5.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 5

Inter-Office Correspondence
R. C. Williams & Co., Inc.
Continental Import Division
610 Fifth Avenue
New York

[Stamped]: Oct. 23, Rec'd.

October 20th, 1944.

Memorandum to: Mr. Ove Fog

From: Mr. Geo. M. Ackerman

The attached, in addition to giving you the terms and conditions of the sale of Harwood Whiskey, serves as the sample of a letter we propose to send to all of our distributors. If you wish me to send this letter to any of the distributors in your territory, please advise.

/s/ GEO.

(George M. Ackerman)

Dear.....,

Several of our distributors have written to us about Harwood Canadian Whiskey, as R. C. Williams' name appears on this bottle as the sole United States distributor importer.

Actually, our company has had nothing to do with the sales representation of this item. All sales were made by representatives of the distillery, and at

(Testimony of Ove Fog.)

their terms. As a service to the Canadian distillery, R. C. Williams & Co., Inc., 265 Tenth Avenue, New York City, merely cleared all United States sales for them, and served as a wholesaler in New York City for this product.

We, at Williams Importers and R. C. Williams & Co., Inc., do not want our distributors to feel that we have neglected you, or forgot about you for one minute, by not offering this whiskey to you. We simply did not have the authority to do so. In several instances, this has caused us some embarrassment, and we explained this to the distillery. Therefore, they have agreed to honor our recommendations in accordance with their ability to deliver, and still in accordance with their terms, which are as follows:—

1. Price: The price of Harwood's is \$20.77 per case F.O.B. Vancouver, British Columbia, Canada—In Bond. This price is lower than the ceiling price permitted by the Office of Price Administration under special order.

2. Terms: 30 days irrevocable letter of credit opened in our name payable through the Chase National Bank, Importers and Traders Branch, Worth and Church Streets, New York City.

3. Documents: Bills of lading—no other documents necessary in view of our being the importer and warehouse entry is made in our name.

4. Shipments: Shipments to be made in carload lots, 1600 to 1750 cases per car.

(Testimony of Ove Fog.)

5. Please advise us of your interest one way or the other. Please also keep in mind that as we do not control the sales of this item, we cannot guarantee exclusive representation to you.

We do not know your position on whiskey, nor are we attempting to sell this whiskey to you; only because of the inquiries sent to us have we asked the distillery to consider the desires of our friends and customers.

All of our regular items are, of course, handled in the usual way and at our regular terms.

Sincerely yours,

[In pencil.]

Irrevocable credit payable at sight good for 30 days.

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: This may be offered without objection.

Q. (By Mr. tum Suden): Mr. Fog, I show you a document and ask you if you recognize that document.

A. Yes, I do. That is a letter from Mr. Ravaud to me.

Q. And that was in answer to your letter with regard to the distribution of Harwood whisky on the Pacific Coast territory?

A. That is right.

(Testimony of Ove Fog.)

Mr. tum Suden: If the Court please, I have here a letter dated October 21, 1944, from Mr. Jean Ravaud to Mr. Ove Fog, the subject "Canadian Whisky." May I read a portion of it?

The Court: Very well.

Mr. tum Suden: He states:

"I have received your memorandum of October 18 regarding the question of the Canadian whisky distributed by R. C. Williams, and no doubt you have received a letter of explanation from Mr. Ackerman on the subject."

"That is that document that you have right here.

"I would like to confirm, however, that we had a long meeting with Mr. Jaburg, Mr. Koerner, and George Ackerman and myself after the reception of the telegram and the letter from Oscar. By telephone I explained the situation to you, which is as follows:

" 'R. C. Williams wholesale Department have the exclusive franchise of this whisky for New York, provided that they accommodate the Canadian distillers by clearing the merchandise for them and doing the billing in the United States. This is exactly what has happened, for as a matter of fact, Koerner has nothing to do with the sales which are made by representatives of the U.D.L. Distilleries in Vancouver. For this reason, and as the letters of credit have already been opened, it is absolutely impossible to cancel the sales already made in Northern California.' "

(Testimony of Ove Fog.)

And it refers to sales. I do not think it is necessary to ready any more unless the Court desires me. There is one portion towards the end:

“As you know, we are not making any money at all on the Canadian whisky and outside of a moral obligation, I have been glad to obtain this merchandise for Parrott & Co., having in mind that they will use this whisky to push our other items.”

I offer that document in evidence, if the Court please.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

PLAINTIFF'S EXHIBIT No. 6

Inter-Office Memorandum
New York

[Stamped]: Oct. 23, Rec'd.

October 21, 1944.

To: Mr. Ove Fog

From: Mr. Jean Ravaud

Subject: Canadian Whisky

I have received your memorandum of October 18th regarding the question of the Canadian Whiskey distributed by R. C. Williams, and no doubt, you have received a letter of explanation from Mr. Ackerman on the subject.

(Testimony of Ove Fog.)

I would like to confirm, however, that we had a long meeting with Mr. Jaburg, Mr. Koerner and George Ackerman and myself after the reception of the telegram and the letter from Oscar. By telephone, I explained the situation to you which is as follows:

R. C. Williams Wholesale Department have the exclusive franchise of this whiskey for New York, provided that they accommodate the Canadian Distillers by clearing the merchandise for them and doing the billing in the United States. This is exactly what has happened, for as a matter of fact, Koerner has nothing to do with the sales which are made by representatives of the U.D.L. Distilleries in Vancouver. For this reason, and as the letters of credit have already been opened, it is absolutely impossible to cancel the sales already made in Northern California. As no sales were made in Southern California, we used as much pressure as possible, with the help of Mr. Jaburg, and it has been agreed that no other people will be sold in Southern California except Parrott & Co.

As I told you on the telephone, if you think it is going to considerably help us if we sell some of that whiskey to Bohemian, you can very well do so. The most important angle of this proposition is that it reflects the market conditions. As you know, this Canadian Whiskey is an expensive item and there is no doubt in my mind that if customers could obtain the whiskey they want from the Ameri-

(Testimony of Ove Fog.)

can distillers, as well as Scotch and other cheaper Canadian whiskies, they would not show any anxiety to purchase this rather expensive product.

This situation is the same all over the country and we have indications on the Eastern market that retailers who were indulging in special sales on Rum, are now raising the price of the rum. I feel that in the near future we are going to go through another emergency period, probably not as acute as the one of 1943 and the beginning of this year, but an important one.

For your information, I have today received a circular letter from the Council of the Greater New York Wholesale Liquor Dealers Assoc. which is quite interesting and mentions: "It is my opinion, based upon conferences with various groups in the industry that merchandise will be fairly scarce between now and the end of the year. Therefore, I recommend that with a full knowledge of conditions proper merchandising of additional quantities of rums, brandies and cordials, other than Scotches and Whiskies, should be undertaken now."

This is based on the fact that the whiskey in production in August was rather disappointing and that it is very doubtful if the Government is going to declare another whiskey holiday in December. I would like you to call this to the attention of Parrott and our main distributors, and see that they are not going to be without rum or brandy, which undoubtedly is going to be very much in demand before Christmas.

(Testimony of Ove Fog.)

As you know, we are not making any money at all on the Canadian Whiskey and outside of a moral obligation, I have been glad to obtain this merchandise for Parrott & Co., having in mind that they will use this Whiskey to push our other items.

As you also know, we have a considerable amount of merchandise in our warehouses—Rum, Brandy and Port, and I hope that they will take advantage of the Canadian Whiskey they are going to receive, to push the sales of our specialties on a substantial basis.

/s/ JEAN.

(Jean Ravaud.)

C.C. Mr. Ackerman.

jr/b

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: I have no objection to the introduction of the document just handed me.

Q. (By Mr. tum Suden): I show you a letter dated October 27, [24] 1944, from Mr. Ackerman to yourself and ask you if you recognize receiving that.

A. Yes, sir.

Mr. tum Suden: This is a letter from Mr. Ackerman to Mr. Fog, and there is just one phrase I would like to call the Court's attention to here. It says:

"I talked to Mr. Koerner today, and he ad-

(Testimony of Ove Fog.)

vised me that he had received a letter from Parrott & Co., complaining about the terms on the Harwood whisky.

“Please believe me, Ove, when I tell you that the terms are identically the same to all customers. Also please point out that we have nothing to do with the setting of the terms, any more than we had anything to do with the sale of the whisky.

“Obviously, if we were handling this item, the terms of payment would be the same as the terms of payment on all of our other merchandise.” He discusses the effect of the sale of Harwood whisky on wholesale sales.

The Court: This was, of course, during the time that OPA price ceilings were in effect?

Mr. Farraher: That is right.

The Court: You are getting into a field, gentlemen, in which the Federal Courts have had considerable experience. I noticed in one of the letters here the whisky was regarded as maybe being of some help in moving the rum and other products on the market. That has nothing to do with this case, but I have some familiarity with the so-called tie-in sales which reached the Federal Courts in one form or another during the OPA days.

I would like to inquire of counsel whether the amounts received by the defendant in the sales of Harwood whisky are the subject of the complaint of the plaintiff here.

(Testimony of Ove Fog.)

Mr. tum Suden: The amount received by the defendant?

The Court: No, I mean, is it the plaintiff's complaint that he would have received commissions on the sales of the Harwood whisky had he known about those sales at the time?

Mr. tum Suden: Yes.

The Court: I mean, it is the specific Harwood whisky that came from the distillers——

Mr. tum Suden: The Harwood whisky.

The Court: That came from Canada, and that was handled in the manner described in this letter by the defendant. That is the subject matter of the controversy?

Mr. tum Suden: Commission on the Harwood whisky. In brief, their explanation to Mr. Fog was always that they did not handle it, they had nothing to do with it, and therefore he was not entitled to his commission on that whisky, althought they had assured him whatever was sent him in this territory by R. C. Williams would be sent in through the Continental Import and he would be getting his commission on it. Instead of that, they [26] sidetracked the Continental Import and sent the whisky in here.

Mr. Farraher: That is definitely a matter of dispute, if Your Honor please.

The Court: What you just said is not quite clear to me, Mr. tum Suden.

Mr. tum Suden: The point is, Mr. Ravaud employed Mr. Fog, he told him R. C. Williams had

(Testimony of Ove Fog.)

set up this Continental Import Division to handle the national distribution of liquors in the United States, whatever they imported, and he assured him any liquor set out by R. C. Williams, as distinguished from Continental Import, would go through Continental Import Division, go through his division, and he would get his commission on all liquor sent out here by R. C. Williams.

The Court: That I understand, but I gathered from these letters it was the position of the defendant that they did not sell this liquor.

Mr. tum Suden: That is just it. That is why I am introducing these documents. They have always maintained to Mr. Fog that they did not ship it out here, they had nothing to do with the sales, they made no money on it; they only handled it as a matter of accommodation to the distillery in consideration of their getting the wholesale privileges for the metropolitan area of New York.

The Court: I gather from their letters they say, "We did not make these sales. We are billing this merchandise for the [27] Canadian outfit, for which we are making some charge. Sales are made by someone else, made by the distiller or some representative of the distiller. Therefore, it not being a sale, you are not entitled to any commission on that."

Mr. tum Suden: That is the position they take.

The Court: Rather than making any distinction between the export division and the import division and R. C. Williams Company.

(Testimony of Ove Fog.)

Mr. tum Suden: But as a matter of fact, we will show——

The Court: Your contention is that actually there were sales made, and the defense is attempting to avoid its obligation by saying the sales were made by R. C. Williams rather than by the Import Division; is that your position?

Mr. tum Suden: That is part of my position, but they contend they had nothing to do with the sales and they did not handle this liquor.

The Court: I am just trying to follow the testimony.

Mr. tum Suden: I would like to get it clear in Your Honor's mind.

Mr. Farraher: May I call Your Honor's attention to other letters introduced here, where the word "we" was used:

"We do not handle,"

and Your Honor will recall that those are employees of the division and not of the main company itself. So the "we" is not Williams & Company. [28]

The Court: Maybe we can save some time. Do you dispute that the R. C. Williams & Company made sales of the Harwood Canadian whisky in this territory?

Mr. Farraher: Our position is that they made a contract with the distillery that they would be the importers of all the Harwood whisky to be distributed in the United States by this Canadian distillery, that they were to receive for it \$1.60 a case,

(Testimony of Ove Fog.)

that they were to get a regular commission on the sales according to the OPA regulations, on the sales in New York, but elsewhere they received just \$1.60 a case, and they were required to pay 60 cents on that to the agents who made the sale, and the agents were the agents selected by the distiller, for the reason that the distillery wanted to keep up its old customers, since there was a scarcity of whisky, instead of letting another company have it.

The Court: Then the defendant contends it did not make any sales at all.

Mr. Farraher: That is right. It made no direct sales.

The Court: That is what I mean, that it made no sales, that it was getting paid for the service it rendered in distributing, billing and distributing.

Mr. Farraher: That is right.

The Court: That it actually made no sales at all?

Mr. Farraher: That is right.

The Court: Your position is there were no sales made. [29]

Mr. Farraher: That is right.

The Court: It makes no difference whether that is the Import Division or the R. C. Williams & Company.

Mr. Farraher: That is true, except that I wanted to call attention to the fact that some of these letters say, "We earned no money from this."

(Testimony of Ove Fog.)

The Court: You mean the Import Division made no money from it?

Mr. Farraher: Yes, that is what I want to call the Court's attention to.

The Court: But if we make no distinction between the Import Division and R. C. Williams & Company and treat it as one, it is still your position that there is no liability because the defendant did not make any sales.

Mr. Farraher: Yes, that is right, if Your Honor please, and that is the position taken in the dispute, which finally ripened into the settlement, which is pled by the plaintiff himself in the complaint. That was our side of the dispute. His was the opposite side.

The Court: I am commencing to see what the issues are.

Mr. tum Suden: Our position is, if the Court please, that they did import this Harwood whisky, and under their contract with Mr. Fog they shipped it into this territory regardless of how the sales were made.

The Court: Your position is, irrespective of whatever the [30] arrangement was, the plaintiff being the sole representative of the defendant here on this Coast, is entitled to so much per case for all this whisky that was handled, irrespective of the method of handling it by the defendant. That is your position.

Mr. tum Suden: That is right, yes. They had

(Testimony of Ove Fog.)

an agreement that they would ship nothing in here except through his division and they imported it at one price and sold it at another.

The Court: All right. Now the defendant says that that dispute did exist and we settled it. We paid them \$10,000. And your position is that that dispute was settled, it is true, but it was settled on the basis of some representation which you subsequently discovered was not correct.

Mr. tum Suden: That is right.

The Court: We understand each other now as to what dispute it was that was settled or attempted to be settled.

Mr. tum Suden: Yes.

The Court: I think we will take a five-minute recess.

(Recess.) [31]

Tuesday, December 28, 1948

(During the trial of the above-entitled cause, the following occurred during examination of witness Ove Fog:)

Mr. Farraher: We have no objection to the introduction of the document in evidence, your Honor.

Q. (By Mr. tum Suden): I show you a letter dated December 19, 1944 (handing to witness), by Mr. Ackerman to yourself, and ask you if you recognize that? A. Yes, sir. [32]

Mr. tum Suden: This is a letter from Mr. Ack-

(Testimony of Ove Fog.)

erman to Mr. Fog, in response to a letter by Mr. Fog to Mr. Ravaud, on the subject of Harwood whisky, a portion of which I would like to call to the court's attention, as to the following paragraph:

"I believe you like this item as well as I do, especially the way it is being handled, but I have learned that Irving Koerner is definitely in charge of shipments from the distillery.

"Therefore, in the future, Mr. Menzies or any of your other good customers who want any information on Harwood whisky, should contact Irving Koerner at 265 Tenth Avenue, as I understand the distillery only ships after getting a final O.K. from Mr. Koerner."

Q. Now, Mr. Fog, who was Mr. Koerner?

A. Mr. Koerner is the manager of the wholesale liquor division of the R. C. Williams & Company.

Q. And this office at 265 Tenth Avenue is the office of the R. C. Williams Company?

A. That is correct.

Mr. tum Suden: I offer this in evidence.

The Clerk: Exhibit 8.

(Whereupon letter dated December 19, 1944, referred to above, was received in evidence and marked Plaintiff's Exhibit 8.) [33]

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 8

[Letterhead] Continental Import Division of R.
C. Williams & Co., Inc.

December 19, 1944.

Memo to: Mr. Ove Fog

From: Mr. Geo. M. Ackerman

I have your letter of December 15th, addressed to Mr. Ravaud, on the subject of Harwood Whiskey.

I believe you like this item as well as I do, especially the way it is being handled, but I have learned that Irving Koerner is definitely in charge of shipments from the distillery.

Therefore, in the future, Mr. Menzies or any of your other good customers who want any information on Harwood Whiskey, should contact Irving Koerner at 265 Tenth Avenue, as I understand the distillery only ships after getting a final O.K. from Mr. Koerner.

/s/ GEO.

(George M. Ackerman.)

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: Could I have that last answer, please? I didn't catch it. May I have it read, your Honor?

The Court: Yes, please read that.
(Record read.)

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Mr. Fog, did you continue to correspond with Mr. Ravaud and others at Continental Import Division or the R. C. Williams, in regard to the Harwood shipments into your territory?

A. Yes, I did.

Q. From time to time?

A. From time to time.

Q. I see.

(Mr. tum Suden thereupon presented a document to Mr. Farraher for his examination.)

Mr. Farraher: We have no objection to the introduction of this document counsel just handed us.

Q. (By Mr. tum Suden): I show you a letter of February 2, 1945, from yourself to Mr. Jean Ravaud, and ask you if you recall sending that letter (handing to witness)?

A. Yes, sir.

Mr. tum Suden: If the Court pleases, this is a letter—I will not read the entire thing—in which Mr. Fog reminds Mr. Ravaud, or complains about the shipping of Harwood whisky into his territory, and reminds Mr. Ravaud to the effect that “Meanwhile, I am convinced that profits are made on the dealings [34] of Harwood’s whisky sent to my territory, and I understand not by Williams Importers, but by R. C. Williams & Company, and inasmuch as I have been guaranteed that R. C. Williams & Company’s wholesale division in New York will not operate directly in this territory, but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled

(Testimony of Ove Fog.)

to commission even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood.”

In other words, I simply wanted to point out that he stressed the terms of his original contract.

I offer this in evidence.

The Clerk: No. 9.

(Whereupon letter dated February 2, 1945, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 9.)

PLAINTIFF'S EXHIBIT No. 9

Inter-Office Correspondence

R. C. Williams & Co., Inc.

Continental Import Division

610 Fifth Avenue

New York

San Francisco, Calif., February 2, 1945.

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

I am enclosing a copy of a letter that Alvin Vincent of Duffield Distributing Co. in Los Angeles, sent to R. C. Williams & Co. in New York, and of which Parrott & Co. in San Francisco, received a copy. From this letter you will understand that it was accidental that I happened to know anything

(Testimony of Ove Fog.)

about that R. C. Williams & Co. were sending an additional four cars of Harwood's Whiskey to Los Angeles. As I do not get any copies of R. C. Williams correspondence from New York to customers in my territory, I am not in a position to know of anything that is going on except through gossip. I happened to know from my last visit in Los Angeles and when Parrott & Co. in Los Angeles received the first three or four cars of Harwood's Whiskey, that they did not use this merchandise for good distribution of Williams Importers different items. On account of that Harwood's Whiskey is handled outside of my office, I have no way of using any kind of diplomacy that would serve our company's interests.

The main reason I am sending you the copy of this letter that Alvin Vincent wrote to Mr. Koerner, is because if Mr. Koerner is giving Parrott & Co. an exclusive on Harwood's Whiskey in the Southern territory, it is most harmful to my connections with firms like Bohemian Distributing Co. and Simon Levi & Co., in case they should want to have some of this whiskey, and I greatly resent that working conditions for the good of our mutual interests are wrecked by actions within the ranks of our own company, as I must expect representing a fine firm like Williams Importers, i.e., R. C. Williams & Co., that they will live up to their traditions of a high grade of ethical operations and protect their men in the field and by doing so also work for the good of their own interests. I do not

(Testimony of Ove Fog.)

understand why you do not feel obligated to support me in my claim for commission on Harwood's Whiskey shipped into my territory. From this side, it looks to me that it would be against R. C. Williams & Co.'s traditions to have an office in a territory that has been guaranteed that all liquor dealings outside of the metropolitan area, for my territory, go through this office, can allow dealings by which some outsider located in my territory obtain commission or benefits while no consideration is given to your men in this territory. From our early correspondence about Harwood's Whiskey, I was given the impression that there was no profit in such transactions, in which case it was a matter of courtesy from this side and good team work to cooperate. Meanwhile, I am convinced that profits are made on the dealings of Harwood's Whiskey sent to my territory and I understand not by Williams Importers, but by R. C. Williams & Co., and inasmuch as I have been guaranteed that R. C. Williams & Co.'s Wholesale Division in New York will not operate directly in this territory but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled to commission even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood.

If the bottles and shipments were not marked

(Testimony of Ove Fog.)

“Imported by R. C. Williams & Co.,” the whole matter would have been of no consequence at all and would not interfere with my business generally, but as this is a fact I believe my point is justifiably well taken. I furthermore feel that if you can convince R. C. Williams Wholesale Division that they have to pay me a commission, they might just as well deal through this office and by doing so the situation would be half-way solved and then the Harwood’s Whiskey would be used for the good of Williams Importers’ items.

During our conversation in Chicago, I was of the opinion that Mr. Hugo Jaburg would try and straighten up this situation. If you are of the opinion that nothing will be done, will you kindly inform me and I shall consider the intollerable situation of Harwood’s Whiskey closed.

OVE FOG.

OF:vh

Enclosure

[Endorsed]: Filed Dec. 28, 1948.

(Mr. tum Suden then presented a document to Mr. Farraher for his examination.)

Mr. Farraher: No objection to that document being received in evidence.

Q. (By Mr. tum Suden): I show you a letter dated February 3, 1945, from Mr. Ravaud to your-

(Testimony of Ove Fog.)

self, and ask you if you received that letter (handing to witness). A. Yes, sir. [35]

Mr. tum Suden: If the Court please, this refers to a letter from Mr. Fog under date of January 31, regarding Harwood whisky, and it recites:

“We had a meeting this morning with Mr. Ja-burg, George Ackerman, and Mr. Koerner, and a decision is going to be taken early next week. We will let you know immediately what the entirely new policy is going to be, which we hope will take place regarding the sales of Harwood in your territory.”

We offer this in evidence.

The Clerk: Exhibit 10.

(Whereupon letter dated February 3, 1945, referred to above, was then received in evidence and marked Plaintiff's Exhibit 10.)

PLAINTIFF'S EXHIBIT No. 10

Inter-Office Correspondence
R. C. Williams & Co., Inc.

Continental Import Division
610 Fifth Avenue

New York, February 3, 1945.

Memorandum to: Mr. Ove Fog

From: Mr. Jean Ravaud.

I received your letters of January 31st regarding the Harwood Whiskey. We had a meeting this

(Testimony of Ove Fog.)

morning with Mr. Jaburg, George Ackerman and Mr. Koerner, and a decision is going to be taken early next week. We will let you know immediately what the entirely new policy is going to be, which we hope will take place regarding the sales of Harwood, in your territory.

Anyway, Mr. Koerner gave us the confirmation that in the month of February, four cars would be shipped to Parrott, two to Los Angeles and two to San Francisco.

As far as Sierra is concerned, we will see that they get a car, but we cannot possibly advance the taxes on this shipment. Therefore, Sierra will have to find a way to have it tax paid. If they can do this, we will see that they get the car.

/s/ JEAN.

(Jean Ravaud.)

jr/b

[Endorsed]: Filed Dec. 28, 1948.

Q. (By Mr. tum Suden): I will show you a letter dated February 6, 1945, from Mr. George Ackerman to yourself. Do you recognize that, and do you remember having received that document (handing to witness)? A. Yes, sir.

Mr. tum Suden: If the Court pleases, this is a letter from George Ackerman to Mr. Fog, and the substance of it is that Mr. Ackerman reports that the response to Mr. Fog's letter of February 2nd,"

(Testimony of Ove Fog.)

as well as the attached copy of Mr. Vincent's letter to Irving Koerner, have been turned over to me, as I have made it my business to run down this Harwood situation [36] to the very last detail, in an effort to get the picture straightened out to our mutual satisfaction."

He says he had a long meeting with Mr. Koerner and Mr. Jaburg "last Friday on this subject. I explained your situation * * * was intolerable * * *."

He stated:

"I made it clear, in asking for control of Harwood whisky sales and distribution policies, that we are not interested in one penny of commission any place in the United States, and contrary to what you state in your letter, and to what you stated in Chicago, R. C. Williams & Company and any or all of its divisions, do not make more than \$1 per case on all of the Harwood that is sold, except on that amount of whisky which is wholesaled here in New York City.

"It is true that other agents, hired by UDL, are paid by R. C. Williams, as that is the law as long as our name appears on the bottles. However, this money originally comes from UDL."

"No matter what the outcome is, please forget about your commission arguments on this whisky. It is definitely impossible, and it weakens my position if I state that in addition to

(Testimony of Ove Fog.)

control of the item, we want commission for one of our representatives.”

I will offer that document in evidence. [37]

Mr. Farraher: Does the court understand? We might have the witness testify what the initials UDL mean.

Q. (By Mr. tum Suden): Who is UDL, Mr. Fog?

A. I think that Mr. Jacobs might answer that question.

The Court: Is that the Canadian Distillery?

Mr. Farraher: That is the name of it, yes—United Distilleries Limited.

The Witness: Yes, United Distilleries Limited.

Mr. tum Suden: Is this No. 11?

The Clerk: No. 11, yes.

(Whereupon letter dated February 6, 1945, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 11.)

PLAINTIFF'S EXHIBIT No. 11

[Letterhead] Continental Import Division of R. C. Williams & Co., Inc.

February 6th, 1945.

Memo to: Mr. Ove Fog

From: Mr. Geo. M. Ackerman

Your letter of February 2nd, addressed to Mr. Ravaud, as well as the attached copy of Mr. Vin-

(Testimony of Ove Fog.)

cent's letter to Irving Koerner, have been turned over to me, as I have made it my business to run down this Harwood situation to the very last detail, in an effort to get the picture straightened out to our mutual satisfaction.

We had a long meeting with Mr. Koerner and Mr. Jaburg last Friday on this subject. I explained your situation, as well as Mac's in Chicago, as well as others throughout the country, and pointed out that the situation was intolerable insofar as the functions of our Division were concerned.

Mr. Jaburg took a very definite stand, indicating that the desires of our Division had to be satisfied, or the Harwood situation would have to end.

I made it clear, in asking for control of Harwood Whiskey sales and distribution policies, that we were not interested in one penny of commission any place in the United States, and contrary to what you state in your letter, and to what you stated in Chicago, R. C. Williams & Company, and any or all of its Divisions, do not make more than \$1.00 per case on all of the Harwood that is sold except on that amount of Whiskey which is wholesaled here in New York City.

It is true that other agents, hired by U. D. L., are paid by R. C. Williams, as that is the law as long as our name appears on the bottles. However, this money originally comes from U. D. L.

In other words, what I am trying to do is to offer to U. D. L. our sales organization at no cost whatso-

(Testimony of Ove Fog.)

ever, and to have their special agents stay home and collect their commission checks just as long as we can control the entire sales and distribution of this item as long as the R. C. Williams name appears on the bottle.

No matter what the outcome is, please forget about your commission arguments on this Whiskey. It is definitely impossible, and it weakens my position if I state that in addition to control of the item, we want commission for one of our representatives.

I have been given to understand today that these conditions have already been set forth to Mr. Klein, the head of U. D. L., and he is going to render a decision upon his return from Vancouver, which will be in three weeks.

I also wired you today, concerning Sierra Wine & Liquor. Mr. Koerner will be glad to accept their order, but it has to be under the regular terms with which Parrott & Company are acquainted—namely, Letter of Credit on an In Bond shipment.

We definitely cannot get involved in tax paying merchandise, but I can imagine that certainly Sierra can make some arrangements to have it tax paid en route, or through some other company, such as Parrott, with whom they work.

If this is agreeable to them, have them follow the necessary steps of opening their letter of credit in accordance with the instructions that Parrott already have in their files, and their order will be accepted for delivery as soon as possible.

(Testimony of Ove Fog.)

Therefore, other than the Sierra situation, please forget all about Harwood Whiskey, until I have the pleasure of writing to you again on this subject, after a definite decision has been taken.

/s/ GEO.

(George M. Ackerman.)

[Endorsed]: Filed Dec. 28, 1948.

(Mr. tum Suden then presented a document to Mr. Farraher for his examination.)

Mr. Farraher: We will stipulate that the document just showed us was taken and delivered, and that it may be introduced in evidence.

The Court: Very well. Counsel has stipulated this document was sent and received, and may be admitted in evidence.

Mr. tum Suden: All right, your Honor. Are we to identify it?

The Court: It is not necessary, he has already stipulated to it.

Mr. tum Suden: This is a letter, if the Court pleases, [38] in which Mr. Fog writes to Mr. Ravaud and sets forth his complaint on the sale of Harwood Whisky. It is a long letter, and——

The Court: What is the date of it?

Mr. tum Suden: February 13, 1945.

It sets forth his position, quoting from some of his prior letters. The substance of it is that he was

(Testimony of Ove Fog.)

informed that Williams & Company makes nothing on the sale of Harwood whisky, and he quotes from one of the prior letters, or the letter from Mr. Ackerman, I believe it is, that they state that they made not more than \$1 a case. I don't know if you would care to have me read this.

The Court: Well, you may do what you feel best.

Mr. tum Suden: I would like to have the court aware of the content of the letter. That is why I am offering it in evidence. Perhaps I had better read it.

The Court: Well, this is the plaintiff's point of view with respect—still being asserted—to the sale of the Harwood whisky?

Mr. tum Suden: Yes, your Honor.

It says (reading):

“Memorandum to: Mr. Jean Ravaud

Dear Jean:

“I have received a letter from your office written by George Ackerman dated February 6th, and I have acknowledged [39] receipt of this letter to George, informing him I consider it proper to comment on this letter direct to you. My reason for wanting to address my letter direct to you I am sure you will understand, is due to the nature of the matter, inasmuch as same concerns my working arrangement with you and also I consider this occasion timely for me to have my position clarified.

(Testimony of Ove Fog.)

“I believe you should know by now where you stand with me insofar as my loyalty to the best interests of the organization which I represent. I should be more than glad and consider it a privilege to string along with any necessary arrangement when the going is tough, and take a genuine satisfaction in accepting the good with the bad where it would serve a called-for purpose, but I surely feel such thinking should work both ways, and I would now like to know where I stand, insofar as the protection my principals are prepared to give their men in the field.

“It seems I am again, within a short period of time, placed in the position of differing in views in the matter concerning my remuneration, but I cannot feel you would have more respect for the man who would take this lying down. This naturally becomes a pretty personal matter, and one I do not take pleasure in going into, but after all a man's livelihood is a pretty personal matter and he is likely to feel keenly about it.

“As an introduction, and to be sure that we understand each other on the subject concerned, I shall refer to the letter I wrote to you on February 2, from which I shall quote as follows:

“‘The main reason I am sending you the copy of this letter that Alvin Vincent wrote to Mr. Koerner, is because if Mr. Koerner is giving Parrot & Company an exclusive on Harwood's whisky in the southern territory, it is most harmful to my con-

(Testimony of Ove Fog.)

nection with firms like Bohemian Distributing Company and Simon Levi & Company, in case they should want to have some of this whisky, and I greatly resent that working conditions for the good of our mutual interests are wrecked by actions within the ranks of our own company, as I must expect representing a fine firm like Williams Importers, i.e., R. C. Williams & Company, that they will live up to their traditions of a high grade of ethical operations and protect their men in the field, and by so doing also work for the good of their own interests. I do not understand why you do not feel obligated to support me in my claim for commission on Harwood's whisky shipped into my territory. From this side, it looks to me that it would be against R. C. Williams & Company's traditions to have an office [41] in a territory that has been guaranteed that all liquor dealings outside of the metropolitan area, for my territory, go through this office, can allow dealings by which some outsider located in my territory obtain commission or benefits while no consideration is given to your men in this territory. From our early correspondence about Harwood's whisky, I was given the impression that there was no profit in such transactions, in which case it was a matter of courtesy from this side and good teamwork to cooperate. Meanwhile, I am convinced that profits are made on the dealings of Harwood's whisky sent to my territory, and I understand not by Williams Importers, but by

(Testimony of Ove Fog.)

R. C. Williams & Company, and inasmuch as I have been guaranteed that R. C. Williams & Company's wholesale division in New York will not operate directly in this territory, but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled to commission even if Williams Wholesale Division does not want to take advantage of my services, but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood.'

"I would like to emphasize the following paragraphs quoted from your office letter of February 6th, i.e.: [42]

I.

" 'I made it clear, in asking for control of Harwood whisky sales and distribution policies, that we were not interested in one penny of commission any place in the United States.'

"You will understand that from this side it is difficult to understand this is satisfactory to your interest, but of course you know best.

II.

" 'R. C. Williams & Company and any or all of its divisions do not make more than \$1 per case on all of their Harwood that is sold except on that amount of whisky which is wholesaled here in New York City.'

"These facts are contradictory in that I am now advised that our company is making at least \$1 per

(Testimony of Ove Fog.)

case on sales of Harwood whisky, not counting the profit made by the Wholesale Division in New York, while it is previously stated that this business was to be entirely free of profit to our company. If we base Williams' profit on \$1 per case on transactions of Harwood's whisky outside of the metropolitan area, Williams are making a gross profit of \$1750 for each car sold. Inasmuch as there is no financial output as far as Williams is concerned because all sales are covered by letter of credit for the purchasers, Williams' expenses to transact this business [43] settles down to office expenses, and if we would figure that at \$100 per car, which is high, Williams would make a profit of \$1650 per car net.

III.

“ ‘No matter what the outcome is, please forget about your commission arguments on this whisky. It is definitely impossible, and it weakens my position if I state that in addition to control of the item, we want commissions for one of our representatives.’

“Your office seems to ignore the fact that our company is making \$1650 net profit for each car sold, and in the same breath I am asked, as a good fellow, to give up my right to a commission on deals transacted on this item in my territory, which in my opinion is overshooting a little. I have a working agreement with you on a commission basis which would entitle me in this instance to 25c per case

(Testimony of Ove Fog.)

on all Harwood whisky already shipped or coming into this territory, and I am at a loss to see where any sound reason has been advanced for changing this agreement beyond the thought that I would be a good fellow to do so.

IV.

“‘In other words, what I am trying to do is to offer UDL our sales organization at no cost whatsoever, and to have their special agents stay home and [44] collect their commission checks just so long as we can control the entire sales and distribution of this item as long as the R. C. Williams name appears on the bottle.’

“‘You can also realize that I find it difficult to believe that R. C. Williams & Company is any less interested in protecting their men in the field than UDL would be in taking care of their people when a circumstance arises over which those people have no control. Believe me, I am a very reasonable man, but when I make a contract in good faith, the only reason I feel it should be altered is to better serve the other party thereto should that contract become a poor one and he stands to be hurt, which is certainly not the case in the ‘Harwood whisky mystery.’

“‘I suppose even between the best of friends controversies are bound to come up, but so long as I know we both want to be fair such a grievance should not be too difficult to overcome. In this case, R. C. Williams is making some good money on

(Testimony of Ove Fog.)

Harwood whisky. The only trouble appears to be that after that profit is made, the fight is on as to who is going to have what. I am sorry you are the one in the middle, but that is the way it is, and you are the one I must turn to for protection.

“The unhappy phase of the whole matter is that I must write you at this time when you are so crowded with other [45] matters and your impending trip to Europe. I should have much preferred to let the matters rest until your return, but unfortunately your office letter of February 6th has placed me in a position where I have no other choice than to meet the situation right now.

“With best regards,

“OVE FOG.”

I offer this in evidence.

The Clerk: Exhibit 12.

(Whereupon letter dated February 13, 1945, referred to above, was received in evidence and marked Plaintiff's Exhibit 12.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 12

Inter-Office Correspondence

R. C. Williams & Co., Inc.

Continental Import Division

610 Fifth Avenue

San Francisco, Calif., February 12, 1945.

Memorandum to: Mr. Jean Ravaud

From: Mr. Ove Fog

Dear Jean:

I have received a letter from your office written by George Ackerman dated February 6, and I have acknowledged receipt of this letter to George informing him I consider it proper to comment on this letter direct to you. My reason for wanting to address my letter direct to you I am sure you will understand, is due to the nature of the matter inasmuch as same concerns my working arrangement with you and also I consider this occasion timely for me to have my position clarified.

I believe you should know by now where you stand with me insofar as my loyalty to the best interests of the organization which I represent. I should be more than glad and consider it a privilege to string along with any necessary arrangement when the going is tough, and take a genuine satisfaction in accepting the good with the bad where it would serve a called for purpose, but I surely feel such thinking should work both ways and I

(Testimony of Ove Fog.)

would now like to know where I stand insofar as the protection my principals are prepared to give their men in the field.

It seems I am again, within a short period of time, placed in the position of differing in views in the matter concerning my remuneration, but I cannot feel you would have more respect for the man who would take this lying down. This naturally becomes a pretty personal matter and one I do not take pleasure in going into, but after all a man's livelihood is a pretty personal matter and he is likely to feel keenly about it.

As an introduction, and to be sure that we understand each other on the subject concerned, I shall refer to the letter I wrote to you on February 2, from which I shall quote as follows:

"The main reason I am sending you the copy of this letter that Alvin Vincent wrote to Mr. Koerner, is because if Mr. Koerner is giving Parrot & Co. an exclusive on Harwood's Whiskey in the Southern territory, it is most harmful to my connections with firms like Bohemian Distributing Co. and Simon Levi & Co., in case they should want to have some of this whiskey, and I greatly resent that working conditions for the good of our mutual interests are wrecked by actions within the ranks of our own company, as I must expect representing a fine firm like Williams Importers, i.e., R. C. Williams & Co., that they will live up to their traditions of a high grade of ethical operations and protect

(Testimony of Ove Fog.)

their men in the field and by doing so also work for the good of their own interests. I do not understand why you do not feel obligated to support me in my claim for commission on Harwood's Whiskey shipped into my territory. From this side, it looks to me that it would be against R. C. Williams & Co.'s traditions to have an office in a territory that has been guaranteed that all liquor dealings outside of the metropolitan area, for my territory, go through this office, can allow dealings by which some outsider located in my territory obtain commission or benefits while no consideration is given to your men in this territory. From our early correspondence about Harwood's Whiskey, I was given the impression that there was no profit in such transactions, in which case it was a matter of courtesy from this side and good team work to cooperate. Meanwhile, I am convinced that profits are made on the dealings of Harwood's Whiskey sent to my territory and I understand not by Williams Importers, but by R. C. Williams & Co., and inasmuch as I have been guaranteed that R. C. Williams & Co.'s Wholesale Division in New York will not operate directly in this territory but that transactions concerning sales of liquor would go through this office, it seems logical to me that I am entitled to commission even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels, thereby eliminating my rights of livelihood."

I would like to emphasize the following para-

(Testimony of Ove Fog.)

graphs quoted from your office letter of February 6th, i.e.:

1) "I made it clear, in asking for control of Harwood Whiskey sales and distribution policies, that we were not interested in one penny of commission any place in the United States."

You will understand that from this side it is difficult to understand this is satisfactory to your interest, but of course you know best.

2) "R. C. Williams & Co. and any or all of its divisions do not make more than \$1.00 per case on all of their Harwood that is sold except on that amount of whiskey which is wholesaled here in New York City."

These facts are contradictory in that I am now advised that our company is making at least \$1.00 per case on sales of Harwood Whiskey not counting the profit made by the wholesale division in New York, while it is previously stated that this business was to be entirely free of profit to our company. If we base Williams' profit of \$1.00 per case on transactions of Harwood's Whiskey outside of the metropolitan area, Williams are making a gross profit of \$1750 for each car sold. Inasmuch as there is no financial output as far as Williams is concerned because all sales are covered by Letter of Credit from the purchasers, Williams' expenses to transact this business settles down to office expenses and if we would figure that at \$100 per car, which is high, Williams would make a profit of \$1650 per car net.

(Testimony of Ove Fog.)

3) "No matter what the outcome is, please forget about your commission arguments on this whiskey. It is definitely impossible, and it weakens my position if I state that in addition to control of the item, we want commission for one of our representatives."

Your office seems to ignore the fact that our company is making \$1650. net profit for each car sold, and in the same breath I am asked, as a good fellow, to give up my right to a commission on deals transacted on this item in my territory, which in my opinion, is over-shooting a little. I have a working agreement with you on a commission basis which would entitle me in this instance to 25c per case on all Harwood Whiskey already shipped or coming into this territory, and I am at a loss to see where any sound reason has been advanced for changing this agreement beyond the thought that I would be a good fellow to do so.

4) "In other words, what I am trying to do is to offer to U.D.L. our sales organization at no cost whatsoever and to have their special agents stay home and collect their commission checks just so long as we can control the entire sales and distribution of this item as long as the R. C. Williams name appears on the bottle."

You can also realize that I find it difficult to believe that R. C. Williams & Co. is any less interested in protecting their men in the field than U.D.L. would be in taking care of their people when a cir-

(Testimony of Ove Fog.)

cumstance arises over which those people have no control. Believe me, I am a very reasonable man, but when I make a contract in good faith, the only reason I feel it should be altered is to better serve the other party thereto should that contract become a poor one and he stands to be hurt, which is certainly not the case in the "Harwood Whiskey mystery!"

I suppose even between the best of friends controversies are bound to come up, but so long as I know we both want to be fair such a grievance should not be too difficult to overcome. In this case, R. C. Williams is making some good money on Harwood Whiskey. The only trouble appears to be that after that profit is made, the fight is on as to who is going to have what. I am sorry you are the one in the middle, but that is the way it is and you are the one I must turn to for protection.

The unhappy phase of the whole matter is that I must write you at this time when you are so crowded with other matters and your impending trip to Europe. I should have much preferred to let the matter rest until your return, but unfortunately your office letter of February 6 has placed me in a position where I have no other choice than to meet the situation right now.

With best regards,

OVE FOG.

OF:vh

[Endorsed]: Filed Dec. 28, 1948.

(Testimony of Ove Fog.)

The Court: Now, Mr. tum Suden, this dispute continued right up to the time that the agreement of March, 1946, was made?

Mr. tum Suden: Yes, your Honor.

The Court: Correspondence continued to pass between the parties?

Mr. tum Suden: This correspondence; I am bringing it up to that. This letter, here, brought the thing more or less to an issue.

The Court: This letter?

Mr. tum Suden: This letter that I just read. It sets forth his position.

The Court: Now, is there an additional letter, or is there additional correspondence that you are going to put in [46] between now and March of 1946?

Mr. tum Suden: Yes, your Honor, I would like to, a few letters.

The Court: Why don't you get them all together and submit it to the other attorney and just offer it as one?

Mr. tum Suden: If the Court desires me to, I would be glad to.

The Court: I mean, I think it would probably save time if you would hand them, or call their attention to the letters you are going to put in, in the order you are going to put them in, and then they can always be looking at one, and it will save time in putting them in.

Mr. tum Suden: All right.

(Testimony of Ove Fog.)

Mr. Farragher: There is no objection to the introduction of this. We will stipulate it was sent by Mr. Ravaud and received by Mr. Fog.

The Court: Very well.

Mr. tum Suden: This letter, if the Court pleases, is one dated March 5, 1945. It is addressed to Mr. Fog by Mr. Ravaud, and it is an acknowledgment of that letter of February 12 and 13 which I just read. He states that he has waited until today, and is answering the letter of February 12, "because I thought that by this time we would have been able to settle the matter to the satisfaction of everyone concerned, and we had to wait for Mr. Klein to return from [47] Canada."

It reiterates that R. C. Williams is making \$1 a case on Harwood, gross profit, but even if it seems "paradoxical, it is not Williams Importers, and you are working for Williams Importers."

It relates also to attempts to arrange for the possibility of a commission for Mr. Fog, but it does not——

The Court: Have it marked and I will look at it while you get ready to present the next one.

Mr. tum Suden: Yes, your Honor.

The Clerk: Exhibit No. 13.

(Letter referred to above dated March 5, 1945, was received in evidence and marked Plaintiff's Exhibit 13.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 13

Inter-Office Correspondence

Williams Importers

A Division of R. C. Williams & Co., Inc.

610 Fifth Avenue

New York, March 5, 1945.

Memorandum to: Mr. Ove Fog

From Mr. Jean Ravaud

Dear Ove:

I waited until today to answer your letter of February 12 regarding what you call the Harwood Whiskey mystery, because I thought that by this time we would have been able to settle the matter to the satisfaction of everyone concerned, and we had to wait for Mr. Klein to return from Canada.

We had a conversation with Mr. Klein, and it looks very much as if we are going to be able to make a satisfactory settlement in the near future.

You can be sure that we appreciate the fairness of your suggestions regarding the distribution of Harwood in Southern California, but the matter is more complicated than you understand and what you are trying to explain.

It is true that R. C. Williams is making \$1.00 a case on Harwood, gross profit, but even if it sounds paradoxical, it is not Williams Importers, and you are working for Williams Importers. As a matter of fact, I am also working for Williams Importers and I have nothing to do with the sales of R. C. Williams.

(Testimony of Ove Fog.)

It is also true that I do not at all like the Harwood setup and it is for this reason that George Ackerman and I are trying to find the ideal solution. In that solution, we will try to obtain a possible compensation for the salesmen of Williams Importers.

As a matter of fact, I want to point out that even if we can arrange that you receive a commission on this transaction, Williams Importers has given up the idea of making any profit on Harwood, but will probably handle it just as an accommodation for the salesmen and distributors.

Things are not moving here as fast as you think and decisions are not reached as easily as you hope they are. Therefore, you have to be patient, and as they say in America, "wait and see."

/s/ JEAN.

(Jean Ravaud.)

[Endorsed]: Filed Dec. 28, 1948.

Mr. Farraher: I wonder if I might suggest to Mr. tum Suden that he have his witness identify the Mr. Klein referred to in the letter.

The Court: Yes.

Q. Who is Mr. Klein?

A. Mr. Klein, I understand, is the head of the UDL in Canada.

The Court: Is that correct?

Mr. Farraher: Yes, your Honor.

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Now, Mr. Fog, in response to these letters that you wrote to Mr. Ravaud, did you have any direct discussion with either Mr. Ravaud or Mr. Jaburg, or any of the other officers of the R. C. Williams & Company, in regard to [48] the sale of Harwood whisky in your territory?

A. At what time are you referring to?

A. Well, subsequent to the letter of February 12, 1945, did you have further conversations, either by telephone or personally?

A. Yes, I had many.

Q. You had many conversations; who did you have conversations with?

A. Forward and backward with Mr. Ravaud.

Q. Did they ever explain to you how the sales of Harwood whisky were handled?

A. It was always explained to me that R. C. Williams——

Mr. Farraher: Well, if your Honor please, can we fix with whom this conversation was held?

The Court: Who said this? Who was it that told you what you were about to say?

The Witness: Mr. Ravaud.

The Court: All right, go ahead. You started to explain what he had said to you.

A. (Continuing): Mr. Ravaud told me that he couldn't do anything about the Harwood situation for me, because it was not handled by them or by R. C. Williams; it was invoiced, but that was on behalf of the distillery.

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Did you have any conversation with Mr. Ravaud or Mr. Jaburg, of Mr. Ravaud's office, on or about September 13, 1945? [49] A. Yes.

Q. In New York?

A. Yes. I had asked to have the Harwood situation cleared up, but for some months there Mr. Ravaud was in France, and Mr. Jaburg couldn't attend to it until Mr. Ravaud came back, so we had to wait for that. So, finally, in September, 1945, I was called to New York for the purpose of presenting the Harwood situation to Mr. Jaburg and have it cleared up. So I went to New York, and I had a meeting with Mr. Jaburg about 11 o'clock in Mr. Ravaud's office, and I asked Mr. Jaburg why I did not get a commission, that I was entitled to a commission on Harwood whisky, and Mr. Jaburg answered me that because Williams Importers didn't handle it. So I said to Mr. Jaburg, "Mr. Jaburg, do you remember that you have confirmed our gentleman's agreement and guaranteed me that any merchandise shipped either from R. C. Williams or from Williams Importers has to go through my office?" To which Mr. Jaburg answered, "I remember that very well." So I said, "Will you give Mr. Ravaud authority to confirm that in a letter?" And he said, "Yes." But in answer to that question of mine Mr. Jaburg then answered, "Oh, yes, but that is a different deal. We don't sell it."

Q. Referring to Harwood?

(Testimony of Ove Fog.)

A. Referring to Harwood.

Q. Well, did you get such a writing from Mr. Ravaud? [50]

A. Yes, I got it just the last hour before I caught my train a couple of days later.

(Mr tum Suden then presented a document to Mr. Farraher for his examination.)

Mr. Farraher: We will stipulate that this document was sent by Mr. Ravaud and received by Mr. Fog, and that it may be introduced in evidence.

Q. (By Mr. tum Suden): This is the letter that you received at that time (handing to witness). Is that the one that you are testifying to?

A. Yes, sir.

Mr. tum Suden: If the Court please, this letter is dated September 13, 1945. It is addressed to Mr. Ove Fog, the Williams Importers, 310 California Street, San Francisco, California. It reads as follows (reading):

“Dear Mr. Fog:

“This will confirm our conversation held in December, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Company, Inc., except through the Continental Import Division, now Williams Importers.

“very truly yours,

WILLIAMS IMPORTERS,
JEAN RAVAUD,

General Manager.” [51]

(Testimony of Ove Fog.)

I offer that document in evidence.

The Clerk: No. 14.

(Whereupon letter referred to above, dated September 13, 1945, was received in evidence and marked Plaintiff's Exhibit 14.)

PLAINTIFF'S EXHIBIT No. 14

[Letterhead] Williams Importers, A Division of
R. C. Williams & Co., Inc.

September 13, 1945.

Mr. Ove Fog
Williams Importers
310 California St.
San Francisco, Cal.

Dear Mr. Fog:

This will confirm our conversation held in December, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Co., Inc., except through the Continental Import Division, now Williams Importers.

Very truly yours,

WILLIAMS IMPORTERS,
/s/ JEAN RAVAUD,
General Manager.

jr/b

[Endorsed]: Filed Dec. 28, 1948.

(Testimony of Ove Fog.)

Q. (By Mr. tum Suden): Now, Mr. Fog, subsequent to the receipt of that letter, did you have further negotiations or conversations with Mr. Jaburg or Mr. Ravaud in regard to the Harwood whisky commission question?

A. Yes, in that same meeting, Mr. Jaburg said that he would be willing to arbitrate the question of whether I was entitled to Harwood or not. I answered Mr. Jaburg that I was not very well acquainted with arbitration in this country, but I would like to ask my attorney if I would be protected by such an act. And that was where our conversation ended.

Q. And did arbitration ever take place?

A. No, arbitration did never take place.

Q. There was correspondence in regard to arbitration?

A. Yes, there was correspondence, and as you know, I asked you about the arbitration, and you wrote a letter to me, and that letter was sent to Mr. Ravaud, and Mr. Jaburg, and that letter—in that letter you advised——

The Court: Well, don't——

Mr. tum Suden: That is all right.

The Court: You can summarize that situation if there is [52] any dispute about it. There was a discussion about arbitration, but it wasn't had, is that right?

The Witness: That's right.

Mr. tum Suden: The arbitration was not had.

(Testimony of Ove Fog.)

Mr. Farraher: Yes.

Mr. tum Suden: There was a delay.

Q. (By Mr. tum Suden): And why was there a delay in this question of arbitration?

A. For this purpose, that I wanted to—if we should have an arbitration, we should have it in San Francisco, and Mr. Jaburg didn't want to have the arbitration in San Francisco.

Q. Mr. Ravaud was available at that time?

A. No, I think Mr. Ravaud was away for quite a while, and that is why the arbitration question was put off and off. Mr. Jaburg wanted Mr. Ravaud to be present at the time.

Q. So the arbitration did not take place?

A. No.

Q. Did you receive any word from Mr. Ravaud when he returned to the United States?

A. Yes.

Q. Relative to this question?

A. Yes, I received a letter from him after he came back to the United States, and he told me—

Mr. Farraher: Well, just a moment, if your Honor please; we have no objection to the introduction of the letter, but we do [53] object to the witness telling what is in it.

Mr. tum Suden: Well, I just wanted to have one point made.

The Court: Is this something that is germane to the matter, or can we pass it over with a statement?

(Testimony of Ove Fog.)

Mr. tum Suden: Well, it is simply to the effect that Mr. Ravaud reported his return, it is on February 12, 1946, and it notifies Mr. Fog that he will be in San Francisco between the 25th and the 27th of February.

The Court: All right, there is no dispute about that?

Mr. Farraher: None at all.

The Court: All right.

Mr. Farraher: If I might just take a look at that?

Mr. tum Suden: Certainly (handing to Mr. Farraher).

The Court: Does that bring us up, then, to the discussion concerning the agreement, and that resulted in the agreement of March of 1946?

Mr. tum Suden: It brings us up—this date that I have just mentioned brings us up to the time when that discussion was begun.

The Court: And was that in San Francisco?

Mr. tum Suden: In San Francisco.

The Court: Is that what you are going to question the witness about now?

Mr. tum Suden: Yes, your Honor. [54]

The Court: Very well.

Q. (By Mr. tum Suden): Mr. Fog, did you meet Mr. Ravaud in San Francisco on or about the 25th day of February? A. Yes, sir.

Q. Where did you meet him?

Mr. Farraher: That is '45?

(Testimony of Ove Fog.)

Mr. Tum Suden: '46.

Mr. Farraher: Oh, '46.

Q. (By Mr. Tum Suden): And where did you meet him?

A. At the Palace Hotel in San Francisco.

Q. Was he alone?

A. No, he was accompanied by Mr. Jaburg and Mr. Jacobs and Mr. Koerner.

Q. As I understand it, Mr. Jaburg, Mr. Jacobs and Mr. Koerner.

Now, did you have any discussions with any of these gentlemen at that time relative to the Harwood whisky transaction?

A. Yes, I was again—Mr. Jaburg again told me that I had no valid claim on commission on Harwood.

Q. Mr. Jaburg told you that? A. Yes.

Q. Did you have any discussion with Mr. Ravaud at that time? A. Yes.

Q. Do you recall any particular discussion?

A. Yes, I can recall a discussion. As I previously stated, Mr. [55] Ravaud told me that I had no valid claim on Harwood whisky, and we then talked again about arbitration, and I stated that I thought it would be better for both parties if we had a friendly suit. Mr. Jacobs then answered that in that case, I would have to resign, to which I answered him, "No, I do not want to resign, but I prefer that I am discharged and have that in my records." To which Mr. Jaburg answered that he didn't want that.

(Testimony of Ove Fog.)

Q. Did you have discussions relative to a settlement of your claim with any of these parties at that time?

A. Yes, at this particular talk I was referring to, that ended up by—that I was to decide what I was going to do about arbitration or filing suit, or forgetting it. But it was for me to make up my mind, and I had to leave an answer. So I believe a day or two after, I talked to Mr. Jaburg one morning in his bedroom. I remember that the only attire he had on were his BVD's; I remember that distinctly, and that is how I can recall this conversation. I said to Mr. Jaburg that from his assurance to me, I understand that I have no commission on Harwood whisky, and I might just as well understand that, but I feel that R. C. Williams was making quite a lot of money on the franchise in New York, and, after all, the Harwood whisky did come out to my territory, and it did interfere a lot with the good will of my customers, because I couldn't provide them with it as I would like to, and I thought that it had been a bitter pill to swallow, and I thought I should have something out of it, even if I had no commission coming. So Mr. Jaburg asked me, "Well, what have you in mind?" So I said, "Well, I have a heavy tax payment coming up that I would like to have taken care of," and he asked me how much that was, and I said that that amounted to about \$10,000. So he said, "Well, I will think it over and see what I can do about it and I will let you know."

(Testimony of Ove Fog.)

Q. Did you discuss any question of employment with Mr. Jaburg or Mr. Ravaud, or Jacobs, at that time?

A. In that particular period?

Q. Yes.

A. Yes, Mr. Jaburg; I think it was either that afternoon or it was the next day that Mr. Jaburg told me that he would take care of that, and then I believe Mr. Jacobs was also present, and suggested that the working agreements, the gentleman's agreement that I had, that it should be put into a contract so that we wouldn't have any misunderstandings in the future. And to which I said that that would be a fine thing, but I would also have to be assured that no merchandise was shipped into my territory by R. C. Williams, except through my office. So Mr. Ravaud, I think, said that they were now going back to New York, and that I would get a sketch for the contract as soon as they got to it.

Q. Well, did you receive the \$10,000 payment at that time? [57]

A. No. Then a short while after, I received a letter from New York, and in this letter was the draft of the form for the contract, and I believe also that there was a draft for the payment of \$10,000. Anyway, the draft of the contract was not at all that we had discussed it out here—Mr. Ravaud and I and sometimes Mr. Jaburg and sometimes Mr. Jacobs. They were all off and on. We talked together. So I wrote back to New York, and——

(Testimony of Ove Fog.)

The Court: I think we had better not go into the letter. If you have a letter, let's put that in. What is he referring to? Is he referring to this settlement of March 8, 1948, when he mentions the contract?

Mr. tum Suden: Yes, he was referring to that. I was going to introduce that in evidence and the correspondence in connection with that.

The Court: Well, I think this is a convenient hour for adjournment.

Mr. tum Suden: It would be a good point.

The Court: And we will proceed tomorrow morning at ten o'clock.

(An adjournment was taken until tomorrow, Wednesday, December 29, 1948, at 10:00 o'clock a.m.) [58]

Wednesday, December 29, 1948

10:00 o'Clock A.M.

The Clerk: Fog v. Williams.

Mr. tum Suden: Ready.

Mr. Farraher: Ready.

OVE FOG

resumed the stand.

Direct Examination

(Continued)

Mr. tum Suden: If the Court please, yesterday afternoon we were at the point where they were having discussions in the Palace Hotel relative to

(Testimony of Ove Fog.)

the so-called settlement. If the Court please, may I just go back a minute? Yesterday I offered a letter dated February 12, 1946, in which Mr. Fog was advised by Mr. Ravaud that he would be out here on the 25th of February.

The Court: 1945?

Mr. tum Suden: 1946.

The Court: Oh, yes, that is right.

Mr. tum Suden: I have here the answer of Mr. Fog to that letter stating that he would be available and also urging the necessity for settling the Harwood situation.

The Court: You wish to offer both letters?

Mr. tum Suden: I think it would be in the interest of saving time showing that Mr. Fog was——

The Court: Any objection?

Mr. Farraher: No objection. [59]

The Court: Very well, that may be admitted.

(The letter of February 12, 1946, referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 15.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 15

[Letterhead] Williams Importers.

February 12, 1946.

Mr. Ove Fog
Williams Importers
231 Sansome Street
San Francisco, Calif.

Dear Ove:

I arrived a couple of days ago, but as yet, have not been able to find the time to go over the entire situation and to read all the reports—because as you can imagine, I am pressed with a million and one urgent matters, requiring immediate decisions.

Within a few days, I will send you a long letter, telling you many interesting things. In the meantime, I do not want to wait to let you know that as far as the Hawaiian Islands are concerned, we are going to have this territory included in our territory for Mumm Champagne within two or three months.

I suggest that you do not say anything to anybody about this until you are officially notified.

With best regards.

Sincerely,

WILLIAMS IMPORTERS
/s/ JEAN RAVAUD,

b. General Manager.

(Testimony of Ove Fog.)

P.S. I will probably be in San Francisco between the 25th and the 27th of February, but will let you know definitely. In the meantime, can you tell me your schedule.

[Endorsed]: Filed Dec. 29, 1948.

Mr. tum Suden: May I just read a paragraph of this other letter, if the Court please?

The Court: Very well. What is the date of that letter?

Mr. tum Suden: February 16, 1946.

Mr. Farraher: Is that in evidence?

Mr. tum Suden: It is going to be in evidence next.

Mr. Farraher: If you are going to read it, I think I should see it first, if your Honor please.

Mr. tum Suden: That is one of the letters I just showed you. I am just going to read a paragraph.

Mr. Farraher: I beg your pardon. That is all right.

Mr. tum Suden: It comments on Mr. Ravaud's return from Europe, and then the paragraph I am interested in, and I quote:

“For the good of our mutual interests and future business in this territory, it is important that your decision on the pending matters be rendered. It is also a necessity that the Harwood issue be settled without further

(Testimony of Ove Fog.)

delay. You will better understand why this matter can not be prolonged indefinitely after you now have received the copy of my letter to Mr. Hugo Jaburg of yesterday.”

Mr. tum Suden: I offer that, if the Court please.

(The letter of 2/16/46 was thereupon received in evidence [60] and marked Plaintiff's Exhibit No. 16.)

PLAINTIFF'S EXHIBIT No. 16

231 Sansome Street
February 16, 1946

Mr. Jean Ravaud
Williams Importers
610 Fifth Avenue
New York 20, N. Y.

Dear Jean:

Arriving in my office this morning I was happily surprised to learn from your letter that you now safely have returned to our shore again.

From the many pending matters awaiting your arrival for disposition, you will understand how glad I am to learn that you are back. It is indeed most gratifying to learn that your activities in Europe have been successful, and I am naturally looking forward to hearing further from you in this respect. On account of our mutual great re-

(Testimony of Ove Fog.)

gard for our good friend, Dr. Francis Sylva, of Cereal & Fruit Products, Honolulu, I am naturally most happy to learn that we will be able to distribute MUMM'S in the Hawaiian Islands.

For the good of our mutual interests and future business in this territory, it is important that your decision on the pending matters be rendered. It is also a necessity that the Harwood issue be settled without further delay. You will better understand why this matter cannot be prolonged indefinitely after you now have received the copy of my letter to Mr. Hugo Jaburg of yesterday.

As you will readily understand, my activities and my efforts to look out for your interests here on the West Coast have been very greatly curtailed on account of your prolonged absence,—thereby depriving me of your decisions on certain vital distribution policies. It is very difficult for me to answer a lot of questions which my wholesalers bring to me as to what our final policies will be, and therefore I have tried to avoid them as much as possible without materially hurting our interests.

As your arrival in the United States has been expected for the last three or four weeks, I have hesitated to go away from San Francisco. My territory needs a very thorough going over, and I will have to do a lot of traveling, but such traveling will only have real value after my conference with you.

(Testimony of Ove Fog.)

From your letter you expect to visit San Francisco between the 25th and 27th of February. This is about ten days from today and I shall be waiting for you right here. If your schedule should be delayed, I would suggest that I at once go to New York and talk with you there, as your stand relative to the Harwood issue definitely has to be settled without delay; and with this in mind you may prefer that I come to New York, as I presume that you would desire Mr. Jaburg's presence.

Should you decide to leave for the Coast as scheduled, will you please wire me ahead of time that I may be able to make hotel reservations for you; and will you also advise me the length of time you intend to be here.

With best regards, and Au Revoir.

Yours sincerely,

OVE FOG.

OF:M

[Endorsed]: Filed Dec. 29, 1948.

Q. (By Mr. tum Suden): Mr. Fog, returning to the meeting at the Palace Hotel, did you at any time discuss with either Mr. Jaburg or Jacobs or Ravaud the provisions of your agreement made with Mr. Ravaud relative to shipping merchandise into your territory by R. C. Williams?

A. Yes. During the stay out here, I talked with

(Testimony of Ove Fog.)

everyone of them, but it wasn't in what you would call a meeting. It was in the Palace Hotel, and it might have been in one of the bedrooms. It might have been in the drawing rooms. It might have been in the mornings just as we happened to be there. But the main thing——

Mr. Farraher: If your Honor please, may we have the date of this conversation?

The Witness: Yes, the date of that conversation was in February of 1946. It was made clear by me to them——

Mr. Farraher: Just a minute, if your Honor please. We object to the statement "made clear to me." We would like to have the conversation.

The Court: Yes, just state what you said or what the other party said.

The Witness: I told the gentlemen that the protection I had to have was that no merchandise would be shipped from R. C. Williams into my territory except through my office, and they all understood that and agreed with me on that point.

Mr. Farraher: If your Honor please, we ask that that be stricken out as the conclusion of the witness.

The Court: Yes, that may go out.

The Witness: I beg your pardon?

The Court: You can't state your opinion as to what someone else thought or understood. You can only state what you said and what the other man said.

(Testimony of Ove Fog.)

The Witness: But in this situation where——

The Court: The attorney can argue the case. What you are doing is what many witnesses try to do; they want to argue the case.

The Witness: I am sorry.

The Court: You are limited in telling me what you said and what the other man said as best you can remember it.

Mr. tum Suden: May I ask him a question?

The Court: You go right ahead and develop what you want.

Q. (By Mr. tum Suden): Did Mr. Jaburg or Mr. Ravaud or Mr. Jacobs make any statement or answer to your statement that you insisted on protection against shipment by R. C. Williams into your territory?

A. Yes, they gave me the assurance that I would be protected on that.

Mr. Farraher: If your Honor please, that is the same objection. We would like to know what was said.

Mr. tum Suden: I think when he says they gave him their [62] assurance that he would be protected——

The Court: It is a conclusion. There is no doubt about that.

Q. Can you remember in substance what these men said to you?

A. Your Honor, I am endeavoring very hard to try and place just the words.

(Testimony of Ove Fog.)

Q. You do not have to remember the exact language. If you will state the substance as you recall it, of what these gentlemen with whom you were conferring said, you will answer the question. What did they say? They must have said to you, "Now, Mr. Fog," or whatever they called you, "Ove, such and such is the case," or "We will do such and such," or "We will not do such and such." Try and remember what they said.

A. Whenever I brought up the question—I think I can place it this way—whenever I brought up the question with the gentleman, that particular question or the understanding on my gentleman's agreement with the firm has been so important because——

Q. You are just making a statement to me again. No one is taking issue with you or arguing with you. We are trying to get you to tell us as best you can recall the conversation. That is all.

(To Mr. tum Suden): Why don't you develop it? Perhaps you can ask some further questions, Mr. tum Suden.

Q. (By Mr. tum Suden): Mr. Fog, when you brought up the question in regard to your contract and you told either Mr. Jaburg or Mr. Jacobs or Mr. Ravaud that you insisted on protection against [63] R. C. Williams shipping merchandise into your territory, did Mr. Jaburg or Mr. Ravaud or Mr. Jacobs make any comment on that to you?

(Testimony of Ove Fog.)

A. Yes, they assured me that that was understood.

Mr. Farraher: If your Honor please, it might be after an hour's or two conversation he reaches a conclusion that he was assured such and such.

The Court: Yes. Can't you remember what they said to you?

The Witness: Your Honor, I am trying to explain in words——

Q. (By the Court): That is not so difficult if you stop to think a minute. Don't set yourself up now in opposition to the form of procedure in the courts. You just let yourself relax and go with the tide. When you say, "They assured me that such and such was the fact," what you are doing is making a decision as to what they meant by what they said. What we want to know is not what you think they meant by what they said, but what did they say. Did they say to you, "Mr. Fog, I assure you that such and such is the case"? Is that what you are trying to tell us, or what words did they use?

A. Yes, that is exactly what I am trying to tell the Court, because that was the fact, but I can not remember the words.

Q. In substance, what did these two gentlemen say to you? A. I told——

Q. We know what you said. What did they say? In substance, what words did they use? [64]

A. Well, they nodded their heads and said,

(Testimony of Ove Fog.)

“Yes, we assure you that.” It was at that time such a matter of fact with all of us there wasn’t any procedure at that time. That is why I can’t recall the exact words of it. I am sorry.

Q. (By Mr. tum Suden): Mr. Fog, I show you Plaintiff’s Exhibit No. 14, which is a letter dated September 13, 1945, in which you were confirming the verbal assurance at the conversation held in December 1943 that no merchandise would be shipped into your territory by R. C. Williams, Inc., except through the Continental Import Division. Were the contents of this letter or the making of this letter fresh in your mind at the time you had your meeting at the Palace Hotel?

A. Yes.

Q. Was any reference made during the conversations at the Palace Hotel in regard to this letter or to the substance of this letter?

A. Yes, in my conversation in the Palace Hotel I brought up to Mr. Jaburg and told Mr. Ravaud that I had that assurance that no merchandise would be shipped in my territory by R. C. Williams except through my office, and to that they agreed. To that they said, “That is right.” I suppose that is the way you want me to conform to the court.

Q. Mr. Fog, after the meetings at the Palace Hotel where did you next have any communication with R. C. Williams or Mr. Ravaud or Mr. Jaburg in regard to matters discussed at the Palace Hotel?

A. Then I was called to New York.

(Testimony of Ove Fog.)

Q. Prior to that time——

Mr. Farraher: We will stipulate, if your Honor please, the three letters just handed to us, one dated March 8, 1946, from Ravaud to Fog, one dated March 8, 1946, from Fog to Ravaud, and one dated March 16, 1946, from Ravaud to Fog, were sent by the signers and received by those to whom they are addressed, and they may be admitted in evidence.

The Court: All right. You may read them. You do not have to go through that.

Mr. tum Suden: I just want to ask him a question.

The Court: You may read them in evidence as long as they have been stipulated.

Mr. tum Suden: If the Court please, I refer to the letter of March 8, 1946, from Williams Importers, signed Jean Ravaud, to Mr. Ove Fog. This is a letter of transmittal and it reads as follows. It is short——

“Enclosed you will find two agreements in duplicate. Kindly sign all copies and return them to us for our signature.

“As agreed between us, neither agreement is to be effective without the other.

“Your copies together with a check will be returned to you promptly.

“If you have any question, please phone me.” [66]

And attached thereto were copies of the pro-

(Testimony of Ove Fog.)

posed agreement, or whatever it is, in accordance with the payment of the \$10,000. Perhaps I should read that to you.

The Court: Does that conform to the copy that is attached as Exhibit B to the answer?

Mr. tum Suden: Yes, it is.

Mr. Farraher: In substance they do. There is a sentence added to it.

Mr. tum Suden: This is, as I understand it, the first draft that was sent out for Mr. Fog's signature.

Mr. Farraher: May I withdraw that statement? Were you reading the letter or the exhibit attached to it?

Mr. tum Suden: This is the exhibit. March 8, 1946. This is the release.

Mr. Farraher: The release form?

Mr. tum Suden: Yes.

Mr. Farraher: That is exactly as attached to the complaint.

The Court: Then you do not need to read it.

Mr. tum Suden: Also attached thereto is a copy of a proposed contract covering the terms of his employment for the year ending February 28, 1947, and to be effective March 1, 1946.

Q. Mr. Fog, you received these documents in the mail? A. Yes, I did.

Q. Did you execute those upon receipt or did you take any [67] action in connection with them?

A. No, I did not. I wrote a letter to Mr.

(Testimony of Ove Fog.)

Ravaud in answer to the draft for the contract and told him it was not at all along the lines that we had discussed in San Francisco.

Mr. tum Suden: I will offer this in evidence.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 17.)

PLAINTIFF'S EXHIBIT No. 17

[Letterhead]: Williams Importers, A Division
of R. C. Williams & Co., Inc.

March 8, 1946

Mr. Ove Fog
Williams Importers
231 Sansome Street
San Francisco, Cal.

Dear Ove:

Enclosed you will find two agreements in duplicate. Kindly sign all copies and return them to us for our signature.

As agreed between us, neither agreement is to be effective without the other.

Your copies together with a check will be returned to you promptly.

(Testimony of Ove Fog.)

If you have any question, please phone me.

Sincerely,

WILLIAMS IMPORTERS,
/s/ JEAN RAVAUD,
General Manager

jr/b

Encl.

[Letterhead]: Williams Importers, A Division
of R. C. Williams & Co., Inc.

March 8, 1946

Mr. Ove Fog:

This will confirm our oral agreement of this week, to the effect that while we do not recognize any claim for any commissions on Harwood Whiskey sales in your territory, having previously advised you that Williams Importers has nothing to do with this product, we, in order to obviate any disagreement between us, will pay you the sum of \$10,000. in full and final settlement of all claims which you have made and claims you might assert in the future on the sales of Harwood Whiskey in your territory, as long as this product is not directly handled by the Williams Importers Division.

Will you please sign the original and duplicate signifying your acceptance and return same to us?

Upon receipt of the duplicate and original, your

(Testimony of Ove Fog.)

copy signed by us will be forwarded to you together with our check.

WILLIAMS IMPORTERS
JEAN RAVAUD
General Manager

[Letterhead]: Williams Importers, A Division of R. C. Williams & Co., Inc.

March 8, 1946

Mr. Ove Fog
Williams Importers
231 Sansome Street
San Francisco, Cal.

Dear Mr. Fog:

This will confirm our agreement of this week concerning the terms of your employment as Manager of the Western Division of Williams Importers, A Division of R. C. Williams & Co., Inc., effective as of March 1st, 1946 for the year ending February 28th, 1947, and automatically renewable from year to year unless either party notifies the other by registered mail sixty (60) days prior to the termination of any yearly period of his or its intent not to renew said agreement.

You are to receive an annual salary of \$4,200.00, payable in equal semi-monthly installments.

In addition to your salary, you are to receive a commission of 25 cents per case on the following products sold and delivered in your territory:

(Testimony of Ove Fog.)

Grand Marnier Cordon Rouge Liqueur, Metaxa Greek Specialties, Corgo Brandy & Port Wines, Lozeron Swiss Wines, Diez Hermanos Sherries, Havana Club Cuban Rums, Havana Club Puerto Rican Rums, Bardinet Cordials, Bardinet Specialties, G. H. Mumm Champagnes.

Commission statements are to be rendered monthly.

Commissions on returned merchandise will be charged back against your commission account.

On any additional products that may be handled by this Division for sale in your territory, you will receive a commission in an amount to be agreed upon between us.

Your territory consists of the following:

California, Oregon, Washington, Wyoming, Utah, Nevada, New Mexico, Montana, Arizona, Idaho, Alaska, Hawaii (Except Mumm Champagnes).

Williams Importers reserves the right to determine the quantities of any of its products to be allocated for sale in your territory.

Your duties, generally, subject always to the direction and control of our New York office, shall consist of the following:

To supervise and be responsible for the proper operation of our Western Office.

To employ all necessary personnel after first obtaining the approval of the New York office.

To sell and supervise sales and do all the necessary travelling in connection with same.

(Testimony of Ove Fog.)

Appointment of new or any change of present distributors shall be made only by the New York office.

You are to render an itemized expense account monthly, covering all reasonable business expenses.

You are to devote your full and exclusive time and effort to the conduct of our business.

Very truly yours,

WILLIAMS IMPORTERS

JEAN RAVAUD

General Manager.

[Endorsed]: Filed Dec. 29, 1948.

Mr. Farraher: May it be stipulated, so it comes in in the right order, that is identical with Exhibit A attached to the complaint with the single exception that there is added to it some language on the next to the last paragraph of the first page?

The Court: Comparison will show that.

Mr. Farraher: Yes, your Honor. I will call it to your Honor's attention when I am cross-examining. It must be corrective. I am very sorry. It is attached to the defendant's answer.

The Court: It does not seem to be the same? The document seems to be different.

Mr. tum Suden: The writing? I think maybe that will be cleared up because I might say Mr. Fog finally went to New York and they probably pre-

(Testimony of Ove Fog.)

pared another draft of it for signature in New York.

Mr. Farraher: I notice that is true, if your Honor please. There are several changes in the language. [68]

The Court: It is entirely different.

Mr. tum Suden: That was sent out. May I see that? I have one here.

The Court: Be that as it may, there is no use discussing now what differences there are.

Mr. tum Suden: You are looking at the contract there?

The Court: Yes.

Mr. Farraher: If your Honor, please, it will be shown the contract signed was practically identical with it. That, as I notice, is a contract in December instead of March, a subsequent contract. I am sorry. I made a mistake.

The Court: The contract attached to the answer as Exhibit A does not seem to be in the same language.

Mr. Farraher: No, it was several months later.

Mr. tum Suden: It is a year later.

The Court: What is that?

Mr. tum Suden: The one in the answer is probably the one covering the year 1947. You see, there were two.

Mr. Farraher: That is right.

Mr. tum Suden: It is a later contract.

The Court: Was there a contract of March 8 signed?

(Testimony of Ove Fog.)

Mr. Farraher: Yes, your Honor.

The Court: But not in the same form as that included in Plaintiff's Exhibit 17?

Mr. tum Suden: No. I am sorry if there is confusion here. [69]

The Court: I think it has been cleared up.

Mr. tum Suden: This letter has been identified by Mr. Fog. On March 13, 1946, Mr. Fog wrote to Mr. Ravaud as follows:

"231 Sansome Street, March 13, 1946.

"Mr. Jean Ravaud
Williams Importers
610 Fifth Avenue
New York 20, N. Y.

Dear Jean:

"Thanks for your letter of March 8th enclosing two agreements in duplicate.

"Consistent with my present verbal agreement with Williams Importers and our discussions while you were here—resulting in your decision to put that agreement in contract form—the proposed contract received is barely recognizable and, to my mind, entirely inadequate to eliminate the possibility of future misunderstandings with respect to my position, authority and the extent of my financial participation.

"In order to save time in a lengthy exchange of correspondence, I am enclosing a draft of a con-

(Testimony of Ove Fog.)

tract which I believe will cover my agreement with you and substantiate the terms of the contract as it was outlined in discussion with Mr. Jaburg, Mr. Jacobs and yourself while in San Francisco.

“I recall that we were not all present for all discussions, however I am confident that in a three-way review of [70] our meetings you will find that the points included herein are all facts covered in our various meetings.

“As you know, my knowledge of law is negligible and you or Mr. Jacobs will undoubtedly wish to put this in your own form—or may find some additions which will further serve our purpose—but the issues covered in my draft represent the basic terms and conditions as we covered them for contract purposes while you were all in San Francisco.

“The only point which has come to my mind since your departure is the situation which will arise when we begin our own warehousing and certain merchandise will be returned by Parrott & Co. I believe I have covered this fairly in my draft, however this point remains open for discussion.

“I note the release form submitted only covers \$10,000, while it should read \$10,000.00 cash, plus the \$3,200.00, tax free, at this time remaining on your books against me.” Accompanying that letter, Mr. Fog said his suggested draft. Now, this draft is substantially in the wording of the form that was sent to him in the letter of March 8, but

(Testimony of Ove Fog.)

he had included in this draft certain additions which I would like to call the Court's attention to:

"In addition to your salary, you are to receive a commission of 25 cents per case on all products for which Williams Importers are representatives, sold and delivered in your territory. [71]

"No products will be shipped to or sold and delivered in your territory by R. C. Williams & Co., Inc., or by any of its subsidiaries except through said Western Division of Williams Importers, and upon which you are to receive a commission of 25 cents per case."

And then it provides for the rendering of statements, commissions on returned merchandise, drawing account and other functions of his employment, territory and so on. I particularly wanted to call the Court's attention to that paragraph that no merchandise was to be delivered into the territory by R. C. Williams or through any of its subsidiaries except through his division. I read from my copy. This is the same, if Your Honor please.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit No. 18.)

(Testimony of Ove Fog.)

PLAINTIFF'S EXHIBIT No. 18

[In Pencil]: (White sent N. Y.)

231 Sansome Street

March 13, 1946.

Mr. Jean Ravaud
Williams Importers
610 Fifth Avenue
New York 20, N. Y.

Dear Jean:

Thanks for your letter of March 8th enclosing two agreements in duplicate.

Consistent with my present verbal agreement with Williams Importers and our discussions while you were here—resulting in your decision to put that agreement in contract form—the proposed contract received is barely recognizable and, to my mind, entirely inadequate to eliminate the possibility of future misunderstandings with respect to my position, authority and the extent of my financial participation.

In order to save time in a lengthy exchange of correspondence, I am enclosing a draft of a contract which I believe will cover my agreement with you and substantiate the terms of the contract as it was outlined in discussion with Mr. Jaburg, Mr. Jacobs and yourself while in San Francisco.

I recall that we were not all present for all dis-

(Testimony of Ove Fog.)

cussions, however I am confident that in a three-way review of our meetings you will find that the points included herein are all facts covered in our various meetings.

As you know, my knowledge of law is negligible and you or Mr. Jacobs will undoubtedly wish to put this in your own form—or may find some additions which will further serve our purpose—but the issues covered in my draft represent the basic terms and conditions as we covered them for contract purposes while you were all in San Francisco.

The only point which has come to my mind since your departure is the situation which will arise when we begin our own warehousing and certain merchandise will be returned by Parrott & Co. I believe I have covered this fairly in my draft, however this point remains open for discussion.

I note the release form submitted only covers \$10,000.00, while it should read \$10,000.00 cash, plus the \$3,200.00, tax free, at this time remaining on your books against me.

With kind regards to you all,

Sincerely,

OF:M

Enc.

(Testimony of Ove Fog.)

Inter-Office Correspondence

R. C. Williams & Co., Inc.

Continental Import Division

610 Fifth Avenue

San Francisco, Calif., March 8, 1946.

Ove Fog's Draft

Williams Importers

This will confirm our agreement of this week concerning the terms of your employment as Manager of the Western Division of Williams Importers, A Division of R. C. Williams & Co., Inc., effective as of March 1, 1946, for the year ending February 28, 1947, and automatically renewable from year to year unless either party notifies the other by registered mail sixty (60) days prior to the termination of any yearly period of his or its intent not to renew said agreement.

You are to receive an annual salary of \$4,200.00, payable in equal semi-monthly instalments.

In addition to your salary you are to receive a commission of 25 cents per case on all products for which Williams Importers are representatives, sold and delivered in your territory.

No products will be shipped to or sold and delivered in your territory by R. C. Williams & Co., Inc., or by any of its subsidiaries except through said Western Division of Williams Importers, and upon which you are to receive a commission of 25 cents per case.

(Testimony of Ove Fog.)

Commission statements are to be rendered monthly and paid on or before the 15th day of the month following the month in which merchandise was sold.

Commissions on returned merchandise, except on defective or faulty merchandise, will be charged back against your commission account. No commissions are to be charged back against merchandise returned by Parrott & Co. as a result of establishing our own warehouse. However, no commissions are to be paid on any particular line until equal quantities of cases within each line so returned have been sold.

You are to receive a drawing account of \$500.00 per month, against commissions, until the merchandise returned by Parrott & Co. is resold.

It is understood that in the event Williams Importers or R. C. Williams Co., Inc., secure the representation of additional lines or products in said territory, the sale of the same shall be subject to this agreement.

Your territory consists of the following:

California, Oregon, Washington, Wyoming, Utah, Nevada, New Mexico, Montana, Arizona, Idaho, Alaska, Hawaii.

Your duties, generally, subject always to the direction and control of our New York office, shall consist of the following:

To supervise and be responsible for the proper operation of our Western Office.

To employ all necessary personnel after first obtaining the approval of the New York office.

(Testimony of Ove Fog.)

To sell and supervise sales and do all the necessary traveling in connection with same.

You are to follow the general policies as established from time to time by our New York office, but the active management of our Western Division shall be conducted in accordance with your sound discretion, and all business and inquiries concerning said Western Division shall be conducted only through your office. In other words, the over-all policy is our business, and the execution thereof is your business.

You are to render an expense account monthly covering all reasonable business expenses.

It is further agreed that 10% of the annual net profits before taxes of the Western Division office is to be divided and paid 5% to Ove Fog, and the remaining 5% is to be used by Ove Fog for bonuses to employees at his discretion.

You are to devote your full and exclusive time and efforts to the conduct of our business.

Very truly yours,

WILLIAMS IMPORTERS.

By JEAN RAVAUD,

General Manager, R. C. Williams & Co., Inc.

[Endorsed]: Filed Dec. 29, 1948.

Mr. tum Suden: In response to that letter of Mr. Fog's to Mr. Ravaud, he received a letter from

(Testimony of Ove Fog.)

Mr. Ravaud under date of March 16, 1946. This letter has been submitted to Mr. Farraher and he consents to its being introduced into evidence, and I might read a portion of that. This is from Mr. Ravaud to Mr. Fog and he states:

“I have received your letter of March 13th and I am sending a copy of it to Mr. Jacobs along with a copy of this letter to you, so that he will be able to study it before I meet with him and Mr. Jaburg on Monday or Tuesday to discuss [72] the matter.”

Then he takes issue with some of the suggestions that Mr. Fog made. If you want, I might read it. I will read it.

“However, I can tell you now that a few of the terms of the contract which you have changed cannot possibly be accepted. For instance, I cannot guarantee you .25 per case on all additional products which we will sell in California, for the very good reason that I do not know what kind of products we might have to sell, and if the margin of profit will enable us to give you .25 per case commission. As a matter of fact, I recall very well that when we discussed this question in San Francisco it was decided that should any additional lines be offered for sale in your territory through you, you would be entitled to a commission, the amount of which would be mutually agreed upon.

(Testimony of Ove Fog.)

“Another paragraph to which I personally object is the one regarding the conduct of the business in the Western Division, for we definitely want to have the right to communicate from this office with customers in your territory, keeping you posted at the same time. But not exclusively and always through your office. In other words—what you want by that paragraph—is that as far as we are concerned, we must consider your territory as ‘Off Limit.’ ”

The rest of the letter discusses the return of certain merchandise from Parrott & Co. and leaves the matter there. May I [73] offer this in evidence?

(The document referred to was thereupon received in evidence and marked Plaintiff’s Exhibit No. 19.)

PLAINTIFF’S EXHIBIT No. 19

[Letterhead] Williams Importers.

March 16, 1946.

Mr. Ove Fog,
Williams Importers
231 Sansome Street
San Francisco, Calif.

Dear Ove:

I have received your letter of March 13th and I am sending a copy of it to Mr. Jacobs along

(Testimony of Ove Fog.)

with a copy of this letter to you, so that he will be able to study it before I meet with him and Mr. Jaburg on Monday or Tuesday to discuss the matter.

However, I can tell you now that a few of the terms of the contract which you have changed cannot possibly be accepted. For instance, I cannot guarantee you .25 per case on all additional products which we will sell in California, for the very good reason that I do not know what kind of products we might have to sell, and if the margin of profit will enable us to give you .25 per case commission. As a matter of fact, I recall very well that when we discussed this question in San Francisco it was decided that should any additional lines be offered for sale in your territory through you, you would be entitled to a commission, the amount of which would be mutually agreed upon.

Another paragraph to which I personally object is the one regarding the conduct of the business in the Western Division, for we definitely want to have the right to communicate from this office with customers in your territory, keeping you posted at the same time. But not exclusively and always through your office. In other words—what you want by that paragraph—is that as far as we are concerned, we must consider your territory as “Off Limit.”

There are also a few other questions which will be taken up at my meeting with Mr. Jacobs and Mr. Jaburg. Incidentally, when we open our office in San Francisco, you mention that we would have

(Testimony of Ove Fog.)

to take merchandise back from Parrott & Co. I would like to have an idea of the quantities and assortment of the merchandise you think we should take back, although I consider that as we intend to keep Duffield and Alpha as distributors, and in view of our past performances with Parrott & Co., this merchandise should be definitely kept by Parrott for distribution to their two respective wholesale houses in Los Angeles and San Francisco.

Try to send me this information by return mail, so that I have the exact picture in front of me when I discuss the matter here. With kind regards,

Sincerely,

/s/ JEAN RAVAUD.

[Endorsed]: Filed Dec. 29, 1948.

Q. (By Mr. tum Suden: Now, Mr. Fog, after you received that letter from Mr. Ravaud acknowledging the receipt of your suggestions as to the form of contract, when did you next meet with these gentlemen in regard to your contract?

A. I met them in New York.

Q. Did you go there in response to a telephone call or how did you happen to go there?

A. I believe it was by telephone that Mr. Ravaud told me to go to New York.

Q. Where did you meet them?

(Testimony of Ove Fog.)

A. I first met Mr. Ravaud in his office.

Q. On Fifth Avenue?

A. On Fifth Avenue.

Q. Was anybody else present?

A. Not at that time.

The Court: When was this, Mr. tum Suden?

Q. (By Mr. tum Suden): When was this?

A. This was in March.

Q. 1946? A. 1946.

Q. Shortly subsequent to the letters that you sent? A. Yes. [74]

Q. Did you have a discussion with Mr. Ravaud at that time?

A. Yes, I had a discussion with Mr. Ravaud about the contract that was going to confirm our arrangement relative to the correspondence that I had with them just about the week before, and one of the things that I called to Mr. Ravaud's attention was this paragraph that no merchandise was to be shipped by R. C. Williams into my territory without going through my office. That was not in the contract he suggested to me. He answered me that "You already have that guarantee. As a matter of fact, you have it in writing."

Q. Referring to the letter of September——

A. Referring to that letter, a few months ahead of that, so I said, "Well, that is right."

Q. Was there any further discussion with Mr. Ravaud? Anything further?

A. Yes, we also discussed that situation that in

(Testimony of Ove Fog.)

case they should handle more items where there would not be the regular markup—for instance, in this case where we handled lemon juice that was non-alcoholic—in such a case the commission I was to receive could be adjusted.

Q. Do you recall any further conversations regarding the provisions of the contract?

A. Yes, there was a provision that the contract would run from one year to another, while before my contract was only running, I presume, for the regular three months. [75]

Q. Did you have any discussions with Mr. Jaburg in regard to that contract?

A. Well, finally there was—Mr. Ravaud arranged that we should meet with Mr. Jaburg in Mr. Jacobs' office for the signing of the papers.

Q. Did you so meet?

A. So we did meet in Mr. Jacobs' office.

Q. Mr. Jacobs' office?

A. Mr. Jacobs' office.

Q. And Mr. Jaburg—were all three present?

A. Mr. Jaburg, Mr. Ravaud, Mr. Jacobs and myself. I again called to their attention that I hoped that this contract would help eliminate any misunderstandings.

Q. (By the Court): What contract are you talking about?

A. That is the contract of 1946.

Q. Are you talking about a contract that you had not yet signed?

(Testimony of Ove Fog.)

A. Yes, I was going to sign it.

Q. You were going to sign it?

A. I was going to sign it.

Q. Was there a contract signed?

Mr. tum Suden: I understand so, your Honor.

The Court: At the same time was this receipt for the \$10,000 signed? A. Yes. [76]

Q. At the same time? A. Yes.

Q. Where is that contract?

Mr. Farraher: I have a copy of it. That is what I submitted to the court with that letter of March 8th. They sent this out.

The Court: But what contract was signed?

Mr. Farraher: I have the original contract. I am handing counsel a document dated March 8, 1946, form of a letter addressed to Mr. Ove Fog, which is signed Williams Importers, by Jean Ravaud, General Manager, and accepted and approved by Ove Fog.

The Court: Is that the same document that is attached to the plaintiff's exhibit 17, the letter of March 8th?

Mr. Farraher: Yes, your Honor.

Mr. tum Suden: I think it is.

The Court: Just for the clarity of the situation, I asked those questions. I did not understand what the witness was talking about.

Mr. tum Suden: I will have to straighten that out.

The Court: We are moving a little bit slowly in

(Testimony of Ove Fog.)

this matter, and while I do not wish to hurry counsel, it seems to me we could get at this a little more quickly.

Q. After you received this letter of March 8th, in which was enclosed the form of a proposed contract for the year beginning [77] March 1, 1946, and ending February 28, 1947, as well as a copy of the proposed receipt for the \$10,000 settlement——

A. Yes.

Q. After you received those letters you had some correspondence; you objected to the forms of this contract, is that right?

A. Yes.

Q. Then you went on to New York and had a further discussion?

A. Yes.

Q. After the discussions were had you then signed the two papers dated March 8, 1946, in the form in which they were enclosed in the letter to you, is that right?

A. That is right.

Q. At that time did they give you a check for \$10,000?

A. Yes.

The Court: Now I get that clear.

Q. The agreement that you signed, then, is the agreement of March 8th that is attached to the letter of March 8th?

A. That is right, your Honor.

The Court: Plaintiff's Exhibit No. 17, is that right?

Mr. Farraher: Has that been offered, if your Honor please? I think not.

The Court: I do not think it is necessary because the witness said the document signed is in

(Testimony of Ove Fog.)

the same form as the copy that is attached to the letter of March 8th. Put it in if you wish. [78]

Mr. tum Suden: I do not think it is necessary. It is the same one.

Mr. Farraher: If your Honor please, the document attached to the pleadings is not this document.

The Court: I understand that. That is a subsequent agreement.

Mr. tum Suden: That is a subsequent one.

The Court: Go ahead, Counsel. I just did that to clarify the matter.

Mr. tum Suden: Thank you. I want the court to understand the situation.

Q. Mr. Fog, you returned to San Francisco.

A. Yes, but I should like to add, so the court understands, that at the time we signed that contract I mentioned to Mr. Jaburg that because you assure me no merchandise would be sent into my territory except through my office, it is not in the contract, because I understand I am already assured, to which Mr. Jaburg said, "Yes."

Q. Did you return to San Francisco then?

A. Yes.

Q. And continued as Western Division Manager for Continental Imports or Williams Importers?

A. Yes, sir.

Q. And that continued through the year?

A. Yes, sir. [79]

Q. And subsequently a further contract was entered into? A. Yes, sir, in 1947.

(Testimony of Ove Fog.)

Q. 1947? A. Yes.

Q. And that is the contract that is attached to the complaint?

Mr. Farraher: That is right.

Q. (By Mr. tum Suden): Mr. Fog, did you continue during the year 1947 in the employ of R. C. Williams, or Williams Importers?

A. No, I was asked to resign at the end of February, a few months after I had made a new contract for the year.

Q. Was any reason given to you for your resignation?

A. Well, the reason that was given to me was that they were trying to cut down the operations.

The Court: What was the date of that, Counsel? I do not think you fixed any time.

Mr. tum Suden: I can fix that exactly.

The Witness: That commenced the 1st of January.

Mr. Farraher: April 25, 1947, pursuant to their correspondence or phone negotiations, he executed or wrote a letter to Williams Importers, Division of R. C. Williams, submitting his resignation as of April 30, 1947. I think that will be agreed to, will it not?

The Court: In other words, he only functioned under this agreement of December 31, 1946, which is attached as Exhibit A to the defendant's answer, until April of 1947? [80]

Mr. tum Suden: Correct, just a few months.

(Testimony of Ove Fog.)

Q. Mr. Fog, after you severed your connections with Williams Importers or R. C. Williams, when did you learn that R. C. Williams were selling or shipping Harwood whisky into your territory during the years that you were employed by them? Under what circumstances?

A. In January, 1948, I was subpoenaed by the Internal Revenue, Mr. Gaines, relative to some information he wanted regarding the Harwood, what I know about the Harwood transactions during the period that I was manager for Williams out here.

Mr. Farraher: We have no objection to that.

Mr. tum Suden: If the Court desires, I have here a subpoena which was served on Mr. Fog. I will ask him when he received that subpoena.

The Witness: I received that subpoena in accordance with the date on it.

Mr. tum Suden: You received it on January 28, 1948?

A. That is right.

Q. Did you obey that subpoena?

A. Yes, I went to the office of the Internal Revenue and saw Mr. Gaines.

Q. This subpoena called for the production of correspondence, did it not?

A. Yes, he wanted to see whatever letters, if I had any, regarding Harwood, and they took photostats of some of the [81] letters, and Mr. Gaines, who was the Internal Revenue——

Mr. Farraher: If your Honor please, we object to that as hearsay. We have no objection if it is

(Testimony of Ove Fog.)

offered solely for the purpose of showing information that he had, but we want it understood that it is not evidence of anything Mr. Gaines said was necessarily true, because otherwise it would be hearsay.

Mr. tum Suden: Correct. We are not trying to bind the defendant in this action by the statements of Mr. Gaines. I merely refer to this as showing the source of information obtained by Mr. Fog that R. C. Williams shipped Harwood whisky or sold it in his territory, how he discovered that fact.

The Witness: Mr. Gaines asked me what I knew.

The Court: I do not think it is necessary to go into all that? Is there? Is there any necessity of going into the hearing?

Mr. tum Suden: No, may I ask him to simplify **it this** question: In your conversations with Mr. Gaines, who was the investigator for the Internal Revenue, did you at that time learn from him that R. C. Williams sold and shipped Harwood whisky into your territory during the years 1944, 1945 and 1946?

Mr. Farraher: We object to that as calling for the conclusion of the witness: "Did he learn?" We have no objection to your finding out what was told him on that occasion?

Mr. tum Suden: All right. [82]

Q. Were you told by Mr. Gaines?

A. Yes, I was told that Williams were buying Harwood at one price, marking it up and selling it

(Testimony of Ove Fog.)

at another. In other words, they were doing a regular commercial transaction.

Q. That was the first——

A. That was the first time that I learned and knew that R. C. Williams actually sold the merchandise in this country or in my territory. Always before I was informed by R. C. Williams and everybody, all the executives, that they were clearing the merchandise on behalf of the distillery, and therefore that news was very exciting to me.

Mr. tum Suden: I think that is all from this witness.

Cross-Examination

By Mr. Farragher:

Q. Was anything told you at that time, Mr. Fog, as to what the mark-up was?

A. Yes, during the conversation I received two figures, and I remember that the ceiling price of Harwood was always \$20.77. I remember the other price, \$19.05, I think it was, those two prices.

Q. What was the mark-up?

A. \$1.72, I think it was.

Q. You knew clear back in 1944, did you not, that the liquor was clearing through Mr. Koerner, of Williams & Company?

Mr. tum Suden: I think that question should be more specific, if the Court please. What do you mean by clearing? [83]

The Court: If the witness understands it he may answer.

(Testimony of Ove Fog.)

The Witness: What do you mean by "clearing"? May I ask that?

Q. (By Mr. Farraher): No, you can't ask me questions. But you do not understand the question? A. No.

Q. I will clarify it. You knew as early as 1944 that if any customer of yours wanted any Harwood whisky, it had to come through Mr. Koerner, of Williams & Company, didn't you?

A. It had to go through R. C. Williams & Company.

Q. That is not my question. You knew it had to come through Mr. Koerner, of Williams & Company?

A. At what time are you referring to?

Q. As early as 1944?

A. I don't believe that I knew that in 1944.

Mr. Farraher: I did not expect Mr. tum Suden to stop so quickly or I would have been more prepared.

Mr. tum Suden: I think, Mr. Farraher, Exhibit 8 will clear that up.

Q. (By Mr. Farraher): When did you first discover that if any of your customers wanted any Harwood whisky that they would have to do it through Mr. Koerner?

A. I might have discovered that in 1944 and I might have discovered it early in 1945. You have in your different letters and files there a reference from Mr. Ackerman, where he gives [84] me in-

(Testimony of Ove Fog.)

formation that now he knows that Koerner is the man who is to take care of orders.

Q. You made efforts in 1944 and 1945 to have Mr. Koerner arrange for shipments to customers of yours in this territory?

A. Yes, through Mr. Ravaud.

Q. And you made efforts to contact him directly, didn't you? A. Yes, if I could.

Q. You stated from time to time to Mr. Ravaud that you were having difficulty getting answers to your calls to Mr. Koerner?

A. That is right.

Q. You knew during all that time that any of the whisky that came into this community cleared through Mr. Koerner?

A. Yes, it was cleared through R. C. Williams & Company, yes.

Q. And Mr. Koerner was the man, wasn't he?

A. Well, that I must leave to the president of the company to decide.

Q. Mr. Ackerman told you so, didn't he?

A. Told me what? Pardon me.

Q. That Mr. Koerner was the man to see in connection with the purchase of Harwood whisky?

A. That is right.

Q. So you knew that fact without any question at least a year before the so-called settlement, as Mr. tum Suden refers to it? A. Yes. [85]

Q. And you knew for more than a year from information you received from the company, it-

(Testimony of Ove Fog.)

self, that it was making a dollar a case on Harwood whisky that was shipped into your territory?

A. Will you repeat that?

(Question read.)

A. That is not correct. The first information that I received from Mr. Ravaud, from R. C. Williams, regarding the Harwood transaction, was that they were not making anything at all, that they had received the franchise for metropolitan New York to wholesale Harwood whisky, but in return for doing that, they had to clear the merchandise for the distillery on a national scale.

Q. When you say you were first notified Williams & Company was making no money for Harwood whisky, are you referring to what has been marked Plaintiff's Exhibit 6, which is a letter of October 21, 1944, from Mr. Ravaud to yourself (handing a document to the witness)? I call your attention to the last page for the purpose of saving time.

A. The last page where? On the whole letter?

Q. On that exhibit there.

A. What was your question?

(Question read.)

A. Yes, that letter, and from telephone conversations with Mr. Ravaud.

Q. What language in that letter do you say gave you that information? [86] Just read the language from that letter that told you that Williams & Company was making no money off the Harwood?

(Testimony of Ove Fog.)

A. So that it can be clear, I will have to read quite a little of this letter:

“R. C. Williams Wholesale Department have the exclusive franchise of this whisky for New York, provided that they accommodate the Canadian Distillers by clearing the merchandise for them and doing the billing in the United States.”

Mr. Farragher: Can I interrupt you, Mr. Fog?

Mr. tum Suden: Let him read.

Mr. Farragher: That is not an answer to the question, at all. That language does not relate to the question whether or not they were getting any money.

The Witness: It does as far as I am concerned, your Honor, if I may.

The Court: Let me see the letter.

Mr. Farragher, I think the letter speaks for itself. The question is really argumentative. So far as the time element is concerned, I suppose the question would be proper, if that is the first time he learned; but if you ask him to pick out the part of the letter, it becomes argumentative, because I can read the letter, and I would rather determine that, myself, than have the witness tell me what the letter means.

Mr. Farragher: That is true, your Honor, except this witness [87] is relying upon a setting aside of a settlement agreed upon the ground of misrepresentation on this very point.

(Testimony of Ove Fog.)

The Court: I am not ruling against you. I think you misunderstand me. I am saying you can point out the letter, yourself, and I can read it without asking the witness the question.

Mr. Farraher: May I read to your Honor the portion that is referred to and ask the witness if that is what he means?

The Court: Why don't you read the paragraph on the second page to which you refer and ask the witness if that is the first time that he had heard that they were not making any money, or whatever it was that you want to bring out? I only say that because if you give the witness the letter, he is going to read it and make an argument. That is the natural response to that type of question.

Mr. Farraher: That is right, your Honor. I appreciate that.

Q. I call your attention to the language in Plaintiff's Exhibit 6, which is a letter, you will recall, from Mr. Ravaud to yourself:

“As you know, we are not making any money at all on the Canadian whisky.”

Q. Is that the language that you referred to a minute ago when you said you were told that Williams & Company were making no money out of the whisky? [88]

A. I am referring to the letter as a whole.

Q. On what form were you advised that Williams & Company were making no money out of Harwood whisky?

A. Because they are——

Q. No, in what form.

(Testimony of Ove Fog.)

A. In the form that they are just accommodating.

The Court: No, he means were you told orally or were you told in writing—is that what you mean?

Mr. Farraher: Yes.

The Witness: At that particular time?

Q. (By Mr. Farraher): Mr. Fog, you testified a moment ago that you were first advised that Williams & Company made no money out of Harwood whisky. I am trying to find out from you specifically and definitely in what form, whether it was written or oral, that you got any such information.

A. I should refer to that letter, there.

Q. Is this the letter that you refer to?

A. I will be glad to refer to that letter.

Q. That is the letter. Now, when you read the language written by Mr. Ravaud to you, "As you know, we are not making any money at all on the Canadian whisky," whom did you consider he meant by "we"?

A. R. C. Williams & Company.

Q. What was Mr. Ravaud's job?

A. Mr. Ravaud? [89]

Q. Yes.

Mr. tum Suden: I think this is argumentative, if the Court please.

Mr. Farraher: I do not think so, if your Honor please. There are allegations of false representations here.

The Court: I will overrule the objection.

(Question read.)

(Testimony of Ove Fog.)

A. He was general manager for Williams Importers.

Q. (By Mr. Farragher): Williams Importers was a Division of Williams Company, was it not?

A. It was a division, yes.

Q. And you were working for Williams Importers?

A. I was working for R. C. Williams Division of Williams Importers, and so was Mr. Ravaud, as I understand.

Q. You were working for the division called Williams Bros., is that right? A. Yes.

Q. And you got all your instructions with reference to the handling of the business in your territory from Mr. Ravaud as the manager of that division? A. That is right.

Q. And you had no business of any kind with Williams & Company, itself, the company office, until this Harwood situation arose, is that true?

A. That is right. [90]

Q. So that at the time this letter was written you had no business with Williams & Company, except through the division; that is true, isn't it?

A. I believe so.

Q. At least a year before the so-called settlement or the settlement you knew that Williams & Company was making a dollar a case on the goods, didn't you?

A. Is it a year? I do not have the date of that letter. Maybe you can show it to me.

(Testimony of Ove Fog.)

Q. The letter is February 6, 1945.

A. There is only one letter.

Q. Plaintiff's Exhibit 11.

A. Pardon me. What was the question?

(Question read.)

A. Yes, sir. By letter that I received from Mr. Ackerman on February 6th, he tells me for the first time that now Williams is making a dollar a case on it.

Q. Did you ever inquire of Williams & Company when you learned that there was a mark-up, how much the mark-up was?

Mr. tum Suden: You had better fix the time.

Mr. Farraher: Withdraw that.

Q. After you talked to Mr. Gaines, did you ever discuss the question of the Harwood commissions with any officers of Williams & Company prior to your filing suit? A. No. [91]

Q. You do not know, do you, right now, whether or not Williams was making more than \$1 a case upon the goods, Harwood goods shipped into your territory?

A. I know now that there was a mark-up of \$1.72.

Q. That is not answering my question. You do not know now whether they were making more than \$1 a case on Harwood shipped into your territory?

Mr. tum Suden: I do not think he can answer that question.

Mr. Farraher: He certainly can answer whether he knows.

(Testimony of Ove Fog.)

The Witness: I just don't know an answer to the question.

Mr. tum Suden: Whether he knows at the present time what they are making on Harwood? Is that it?

Q. (By Mr. Farraher): You knew in February, 1945, that Williams & Company was making a dollar a case on Harwood? A. Yes.

Q. Have you any information in your possession that during the time you were with that company that Williams & Company ever made 5 cents more than one dollar a case on the Harwood shipped into your territory?

A. The only information that I have——

Q. No, no, you can answer that "Yes" or "No." if your Honor please. I am asking him if he knows.

The Witness: Can't we simplify the question?

Mr. Farraher: I will try it again.

The Court: I do not think there is any particular difficulty [92] about that question.

(Question read.)

A. No, I have not.

Q. (By Mr. Farraher): Just what information did you receive from Mr. Gaines in addition to the information that you had at the time you resigned in April, 1947, with reference to what Williams & Company made on Harwood shipped into your territory?

A. I got the information that Williams bought the merchandise at a certain price, marked it up,

(Testimony of Ove Fog.)

sold it at another price, and there was a mark-up of \$1.72.

Q. And you do not know whether that \$1.72 represented profit, or not?

A. I was not interested in what they made on it, at all. The thing that interested me was the fact that R. C. Williams owned the merchandise and performed a regular sale?

Q. What do you mean by a regular sale?

A. Well, in the school I came from, when a merchant buys merchandise at one price, marks it up and sells it at another, that I consider a sale.

Q. You do not consider that a commission?

A. Absolutely not.

Q. And your reason, then, for asking that this settlement contract be set aside is that although you knew, you thought you were making a commission on the sales, you found out instead [93] of it being a commission it was a mark-up——

A. What I found out——

Q. No, no, you can answer that "Yes" or "No."

A. You will have to repeat it.

(Question read.)

A. I found out that R. C. Williams' representation that they were just clearing the merchandise was absolutely contrary to the fact that inasmuch as they did not import the merchandise on behalf of the distillery, they imported it for themselves, owned the merchandise after it arrived in this country, bought it at one price and billed it at another

(Testimony of Ove Fog.)

and made a profit on it, that was contrary to my understanding of clearing it.

Q. What difference would it make to you in your position whether they did it one way or the other?

A. The difference to me is whether I was to receive a commission or not, because if they sold the merchandise and shipped it into my territory, I was guaranteed a commission on such sales, but if they were only acting on behalf of the distillery and just making a commission, themselves, then it might be possible that I am not entitled to it.

Q. You know, do you not, that all the Harwood that was shipped into your territory was shipped from the distillery? You know that, do you not?

A. Yes.

Q. And you know that the goods were purchased, that the invoices [94] for any goods that were shipped into this country made into your territory were shipped by Williams & Company?

A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. You knew that any goods that were purchased, any Harwood that was purchased in this territory had to clear through him?

A. Yes, at a certain time of the transactions I got a letter from Mr. Ackerman, where he tells me that now he knows it has to go to Koerner. I don't remember the date.

The Court: That was a letter of either October or December, 1944.

(Testimony of Ove Fog.)

Mr. tum Suden: Exhibit No. 8.

The Court: While you are getting that perhaps we might take the recess at this time.

(Recess.)

Q. (By Mr. Farragher): Mr. Fog, I understood you to say before the recess that you were subpoenaed down to the Internal Revenue Department?

A. That is right.

Q. To bring with you what papers you had concerning the Harwood? A. Yes.

Q. What papers did you have?

A. Mr. tum Suden has whatever papers there are. [95]

Q. Included in those papers were the documents that were introduced in evidence here yesterday and today? A. Yes.

Q. Those were the documents that you had with you when you went to the Internal Revenue Department? A. Yes.

Q. That was almost a year after your resignation from the company? A. That is right.

Q. Those were part of the files of the company, were they not? A. Yes.

Q. Did you have any permission to take them with you?

A. Those files that was in my possession were files that concerned my special communication with the company regarding the dispute we had about Harwood, and the reason that I had them with me was because when I went to New York in 1945

(Testimony of Ove Fog.)

to have the meeting with Mr. Jaburg, at that time I asked my secretary to take out from the files anything that had to do with Harwood, regarding my person, and those were the papers I took with me there, and when I came back, that folder went into my drawer in my desk, together with other folders that I had there. I suppose you are trying to find out how I happened to have them. Is that the purpose?

Q. Yes.

A. So when I left Williams Importers I cleared my desk. Whatever [96] was in that drawer was put down in a box with a lot of other things, and that was taken to a place.

Q. How did Mr. Gaines know that you had any files of the company with you?

Mr. tum Suden: I think that is calling for the conclusion of the witness.

Q. (By Mr. Farraher): If you know.

A. Well, I know, because he asked me if I had any when he talked to me on the phone.

Q. Did you call him or did he call you?

A. He called me.

Q. Did you at the time you left the employ have in mind that you might want to sue the company for any money?

A. Never for one minute.

Q. Did you consider that the documents that you signed with them was a complete settlement of your dispute with them with reference to your right to commissions on Harwood?

(Testimony of Ove Fog.)

A. At the time——

Q. No, no, answer that “Yes” or “No,” please.

(Question read.)

A. I had no dispute with them any more about Harwood. That was settled.

Q. How was it settled?

A. It was settled, I was told——

Q. Wait a minute. How was it settled? [97]

Mr. tum Suden: Let him answer.

The Witness: I think I can answer.

The Court: Just a moment. Take it easy. I think what the attorney wants to know is when you did make the settlement with them and sign the agreements, you considered that a settlement of your grievance with the company?

Q. (By Mr. Farraher): That that settled the dispute with the company with regard to your commission? A. No.

Q. When did you sign the release?

The Court: I do not think he understands the question.

The Witness: No.

The Court: You had better ask your own questions.

The Witness: I would like to answer that question.

The Court: You just relax now and wait until they ask you a question.

Q. (By Mr. Farraher): Calling your attention to what has been marked Plaintiff's Exhibit 17,

(Testimony of Ove Fog.)

which is the letter which Mr. Ravaud sent to you under date of March 8, 1946, enclosing a form of release, which I am showing to you, being the first exhibit attached to the letter—— A. Yes.

Q. You finally, as you have testified, executed that sometime later? A. Yes. [98]

Q. That very document? A. Yes, sir.

Q. When you executed that document did you consider that by doing so you had settled your dispute with Williams & Company with reference to your right to commissions on Harwood?

A. At the time I settled this and signed this there was no dispute. There was nothing to settle.

Q. The day before you signed it you had a long running dispute with them, didn't you, with reference to your commissions on Harwood sales?

A. Not a long running dispute. The reason that I received this \$10,000 was due to the fact that Mr. Jaburg had told me that I did have no commission coming on Harwood, and I finally settled down and believed it, that he was fair and sincere when he made that statement to me, and then I received \$10,000, as I have already testified earlier, as a good will settlement.

Q. You considered the \$10,000 a gift and it had nothing to do with the dispute with reference to Harwood?

A. I shall not say it was just a gift. My business and my territory had been injured by the fact that Harwood was shipped into my territory. I

(Testimony of Ove Fog.)

could not make it available for my customers and R. C. Williams could do nothing about it.

Q. Mr. Fog, you had repeatedly, from 1944 on, been demanding commissions on Harwood that came into your territory, hadn't you, and it got to a point in the fall of 1945, September or [99] October, 1945, that you had this talk with Mr. Jaburg and you determined that you would submit the matter to arbitration? A. That is right.

Q. What was the matter you were going to submit to arbitration?

A. Whether I was entitled to a commission on Harwood whisky or not.

Q. Before you agreed to the submission to arbitration you consulted your attorney?

A. No.

Q. You had not? A. No.

Q. Didn't you testify that when you first had the talk with reference to arbitration that you had to return to California and discuss it with the attorney because you were not familiar with it?

A. After the arbitration question was—the first time the arbitration question was brought up, that is the time I said I would have to talk to my attorney and ask him what it meant.

Q. And you did? A. I did, yes.

Q. And you told your attorney all the facts in your possession with reference to your matter?

A. Not at all.

Q. You did not tell him anything?

(Testimony of Ove Fog.)

A. Nothing at all, only the question of arbitration. I have had [100] no legal advice whatsoever on the Harwood matter. I felt I was dealing with friends that would treat me the way I treated them.

Mr. Farraher: I am handing counsel two letters, one of February 13, 1945, I think signed by Mr. tum Suden, to Ove Fog, and one dated February 15, 1946, from Fog to Mr. Jaburg.

Mr. tum Suden: It looks like somebody has been in my office.

Mr. Farraher: No, this is one that got into our files.

Will you stipulate that you signed it? I have to ask the witness about it, anyway, so I might just as well have him identify it.

Mr. tum Suden: I signed that.

Q. (By Mr. Farraher): Mr. Fog, I am handing you a letter signed by Mr. tum Suden, addressed to you under date of February 13, 1946, and I will ask you whether or not you recall——

Mr. tum Suden: First I would like to have a foundation for that letter, Mr. Farraher, where it came from, and how it got into your possession.

Mr. Farraher: Naturally, it was in the files of the company or we would not have it. It would indicate the witness was more careful taking out some of the files of the company than he was of his own.

Mr. tum Suden: It could have been overlooked. I do not think it is important, anyway. [101]

Q. (By Mr. Farraher): You recall the occa-

(Testimony of Ove Fog.)

sion of receiving that, do you not?

A. Yes, I believe so.

Mr. Farragher: May I offer this, if your Honor please, in evidence, this letter of February 13, 1946, just identified by the witness, and then I want to ask the witness another question about it.

Mr. tum Suden: I question that I would send Mr. Fog a letter in that form.

Mr. Farragher: I am going to ask him about the alterations on that.

Mr. tum Suden: It must have come from my office somehow or other.

Mr. Farragher: I am going to ask him about the alterations.

Mr. tum Suden: Those alterations are in my handwriting. That is a draft of a letter I prepared for him. Whether or not it was sent, I do not know.

Mr. Farragher: When I was examining him I assumed it was Mr. Fog's handwriting, not yours.

Mr. tum Suden: No, it is a draft, corrections made by me in a letter which was probably sent out finally in that form.

Mr. Farragher: May I read the letter?

The Court: Let me see the letter.

(The document referred to was handed to the Court.)

Q. (By Mr. Farragher): I call your attention to the alterations [102] on the next to the last paragraph, the sentence reading, "Assuming that you are a citizen of California, and the R. C. Williams

(Testimony of Ove Fog.)

Company is not a California corporation, the action may be brought in the Federal District Court at San Francisco on the ground of diversity of citizenship." Then there was first written in ink and then scratched out, "Obviating the necessity of your going to New York." Is that your handwriting? A. No.

Q. Mr. tum Suden's?

A. I wouldn't know.

Q. Is there any of your handwriting on that?

A. I do not think so.

Q. Was that a letter that you and Mr. tum Suden got together to write so as to send a copy to Mr. Ravaud?

A. May I read the letter again? I don't recall exactly. This letter must be with reference—again with reference to the arbitration situation, because I hadn't consulted, that I recollect, the Harwood situation——

The Court: Look at the letter before you answer the question. Read the first paragraph. According to that letter you did consult with Mr. tum Suden about your commissions, whether or not you should arbitrate the dispute or go to court.

Q. Is that the truth, or not?

A. Yes. [103]

Q. You were mistaken a while ago when you said you did not consult with them?

A. Yes, I did not know I had brought this up to them to this extent, but I must have.

(Testimony of Ove Fog.)

Q. (By Mr. Farraher): With your memory refreshed from that, you did convey to Mr. tum Suden all the information you had with reference to your claim, did you not?

A. No, not all the information, because—why I can say that is because this must have been a very small matter, because I didn't get, as far as I know, a bill for the consultation. I only received one bill from Mr. tum Suden with regard to this one, and that was for his advice regarding the arbitration. So this must be a small matter.

Mr. Farraher: I am surprised that Mr. tum Suden would establish a precedent of that kind.

Mr. tum Suden: If you want me to testify I will tell you what happened.

Mr. Farraher: I will offer the letter of February 15, 1946, from Mr. Farraher to Mr. Jaburg.

(The two letters referred to were thereupon received in evidence and respectively marked Defendants' Exhibits A and B.)

(Testimony of Ove Fog.)

DEFENDANT'S EXHIBIT A

Cable Address "Tumsuden"

Peter tum Suden
Richard tum Suden
Attorneys at Law
605 Market Street
San Francisco 5
Phone DOuglas 0193

February 13, 1946.

Mr. Ove Fog
231 Sansome Street
San Francisco, California

Dear Mr. Fog:

I have reviewed the questions submitted to me relative to your claim for commissions as representative of R. C. Williams Co., Inc. (i.e. Williams Importers). It is my considered opinion that if the matter must be settled by litigation your interests will be better served by court procedure rather than by arbitration. A trial by court permits a more through presentation of the facts. Furthermore, the findings of the court may be reviewed by appeal which ordinarily cannot be done in arbitration proceedings.

[Williams Importers, i.e. R. C. Williams & Co., Inc., in pencil.]

The amount and issues involved are too important

(Testimony of Ove Fog.)

and warrant the most serious and thorough consideration.

Assuming that as you are a citizen of California and the R. C. Williams Co., is not a California corporation, the action may be brought in the Federal District Court at San Francisco on the ground of diversity of citizenship obviating the necessity of your going to New York.

May I also call to your attention that because of the statute of limitations and possible claim of laches, you should take prompt action. Otherwise you may be foreclosed.

Yours very truly,

/s/ RICHARD TUM SUDEN.

Rts:R

I shall be pleased to hear from you at your earliest convenience your reaction to the suggestions of my advisor inasmuch as I know that you are also interested in protecting my rights.

[Endorsed]: Filed Dec. 29, 1948.

(Testimony of Ove Fog.)

DEFENDANTS' EXHIBIT B

[Letterhead] Williams Importers.
231 Sansome Street

February 15, 1946.

Mr. Hugo F. Jaburg, President
R. C. Williams & Co., Inc.
265 Fifth Avenue
New York, N. Y.

Dear Hugo:

In anticipation of Mr. Ravaud's return and an early handling of the Harwood matter I have, in the interest of fairness to the respective positions we have taken, again carefully reviewed the facts. In an effort to remove any remaining doubts in my mind, I presented the matter to my legal advisers, requesting an impartial opinion of my views. I quote below the letter just received from them:

"I have reviewed the question submitted to me relative to your claim for commissions as representative of Williams Importers, i.e., R. C. Williams & Co., Inc.

It is my considered opinion that if the matter must be settled by litigation, your interests will be better served by court procedure rather than by arbitration. A trial by court permits a more thorough presentation of the facts. Furthermore, the findings of the court may be reviewed by appeal,

(Testimony of Ove Fog.)

which ordinarily cannot be done in arbitration proceedings.

The amount and issues involved are of such importance that they warrant the most serious and thorough consideration.

As you are a citizen of California, and the R. C. Williams Co. is not a California corporation, the action may be brought in the Federal District Court at San Francisco on the ground of diversity of citizenship.

May I also call to your attention that because of the statute of limitations and possible claim of laches, you should take prompt action; otherwise you may be foreclosed."

As I now have reviewed this matter fully again, will you allow me to suggest that you—from your side—also review the matter with your legal counsel. After you have done this and made yourself again familiar in detail with your Company's commitments to me, I believe that you will respect the stand I take.

Knowing that you wish to be fair in this controversy, I feel that you will see and agree with my viewpoint in the handling of the matter.

Please go to work, Hugo, and let me hear from you. If you and I, who are friends and respect the rights of each other, cannot settle such a clear-cut issue, it certainly is a bad outlook for the good of the world to depend upon UNO.

(Testimony of Ove Fog.)

Awaiting your answer to this, without too much delay, I send my best regards.

Sincerely yours,

/s/ OVE FOG.

OF:M

cc: Jean Ravaud

[Endorsed]: Filed Dec. 29, 1948.

Mr. Farragher: I would like to read a portion of this before I examine the witness with reference to it. This is dated February 15, 1946, and is from Mr. Farragher to Mr. Jaburg: [104]

“In anticipation of Mr. Ravaud’s return and an early handling of the Harwood matter, I have, in the interest of fairness to the respective positions we have taken, again carefully reviewed the facts. In an effort to remove any remaining doubts in my mind, I presented the matter to my legal advisers, requesting an impartial opinion of my views. I quote below the letter just received from them:”

And then the letter as corrected, the letter that has just been introduced, is set out in this letter.

Q. When you said in this letter, Mr. Fog, that “In an effort to remove any remaining doubts in my mind, I presented the matter to my legal advisers, requesting an impartial opinion of my

(Testimony of Ove Fog.)

views," when you said that, didn't you mean to advise Mr. Jaburg that you had taken up the facts of the situation with your counsel and received his advice upon the matter?

A. May I see that letter?

(The document referred to was thereupon handed to the witness.)

A. Yes, I mean by that I was trying, from my end of it, to find out the fair way of looking upon the matter.

Q. What matter did you mean?

A. Whether I was entitled to a commission on Harwood whisky, or not.

Q. And you submitted your facts to Mr. tum Suden and he gave [105] you the opinion which you sent on to Mr. Jaburg, is that right?

A. That was right, yes.

Q. So when you went on to New York finally to sign up the documents, you had had legal advice as to your rights?

A. In a way, yes. But those letters that are presented to me here do not indicate, as you are indicating to me, that I had had long intimate discussion about the Harwood situation, because I do not recall that I had had a deep conversation with Mr. tum Suden about all the details of this matter. It was on the service, the technical things of it, as far as I remember, that my discussion with Mr. tum Suden was concerned, but I would be very happy if you would have Mr. tum Suden testify to

(Testimony of Ove Fog.)

whatever he knows about it, because that would clarify the situation in your mind.

Q. At least you will say now that when you said you had not had any legal advice upon the matter prior to taking up the settlement with Mr. Jaburg, you were wrong?

A. Yes, when you refer to those letters, but I still believe when I am talking about legal advice, I am talking about the legal advice pertaining to arbitration, or which way is the best to get a judge—the right judgment of our controversy.

Q. There had been no dispute between you and Mr. Jaburg whether you should sue or have arbitration, was there? You had not discussed it yet, had you? [106] A. In 1946?

Q. Yes. A. Sure.

Q. You had discussed the question of whether you should sue or arbitrate?

A. In—this is in—

Q. In your conversation in New York.

A. What date is this letter?

Q. I will withdraw that.

A. Will you kindly give me that letter?

Q. February 13, 1946.

A. That is right. That is earlier.

Q. I notice that you had in here—there is added and then stricken out the words, “Obviating the necessity of your going to New York.” Was that one of your considerations against arbitration, that the arbitration that you had arranged for was in New York? A. Yes.

(Testimony of Ove Fog.)

Q. On this question of arbitration, you had been discussing it back and forth for some months, hadn't you, since about September, 1945?

A. Well, the reason——

Q. No, but you had?

A. The reason that was thrown out——

The Court: All he is trying to find out is did he discuss [107] it or not.

The Witness: Yes.

The Court: If you answered the questions a little more simply we would get along, and then you can always make an explanation if you wish.

Q. (By Mr. Farraher): You kept pressing the matter, didn't you? A. Yes.

Q. You wanted an early arbitration. Before this complaint was prepared, you stated the facts of your case to Mr. tum Suden, didn't you? A. Yes.

Q. You brought him your files? A. Yes.

Q. He prepared a complaint based upon what you told him and you swore to it?

A. That is right.

Q. I call your attention to page 5 of the complaint, paragraph 9—paragraph 8 of page 3, and to this language:

“Defendant corporation falsely and fraudulently, and for the purpose of deceiving and misleading plaintiff, represented and maintained that defendant corporation had nothing to do with the importation or sale of said Harwood whisky in the said Western Division area.”

(Testimony of Ove Fog.)

That is not a fact, is it?

A. That is a fact. [108]

Q. You have already testified that the Harwood was clearing through Williams & Company, that you contacted Koerner to get shipments into your territory to your customers?

A. I know that R. C. Williams was importing Harwood whisky on behalf of the distillery into the United States. I do not know who imported it from there on into my territory. I understand that it goes from one State to another. That is referred to as importing, isn't that correct?

Q. I do not know.

A. I understand it is.

Q. Mr. Fog, you knew that the invoices for the very whisky, the Harwood whisky that came into your territory, came from the Williams & Company office; you knew that, didn't you?

A. That is right.

Q. And you knew that when your customers pressed you for some of it, you were instructed to contact Koerner to get it?

A. That is right.

Q. You now say, do you, that this statement is true, that you did not know that they had anything to do with the importation or sale of Harwood whisky in this territory?

A. That is right.

Q. Were there any salesmen selling Harwood whisky in this territory?

(Testimony of Ove Fog.)

A. I doubt it, but I understand there were salesmen around.

Q. You never ascertained that there were any salesmen of [109] Williams & Company, did you?

A. No.

If there were you would have known it, wouldn't you? A. Not necessarily.

Q. So far you never had any insinuation that any salesmen of Williams & Company were in your territory selling Harwood whisky? A. No.

Q. And you know that Harwood whisky was shipped direct from the distillery into your territory?

A. Yes, I believe that is the way it came.

Q. In other words, it did not go by way of New York?

A. No, that would be very natural.

Q. And you knew that the Williams & Company warehouse contained no Harwood whisky, isn't that true? A. How would I know?

Q. You do not know anything to the contrary, do you? A. No.

Q. Just what is it that you contend that Williams & Company did with this whisky and its effort to get it into the hands of people in your territory different from what you believed at the time this settlement was made?

A. For three years, or since 1944, when the Harwood situation came up, I have only learned by letter and by mouth that R. C. Williams did not

(Testimony of Ove Fog.)

handle and did not sell Harwood whisky, but [110] are only clearing it for the distillery in accommodation for having the franchise for metropolitan New York. Would you like to know what different I find now after January, 1948?

Q. Yes, tell us the difference.

A. Is that what you want me to do?

Q. Yes.

A. In 1948 I learned through my conversation with the Internal Revenue that R. C. Williams owns the merchandise, owns Harwood after it is imported to this country. They buy it at one price, mark it up, and sell it as a regular commercial transaction. In other words, R. C. Williams & Company are selling Harwood contrary to what they have stated they were doing. They were just clearing it before.

Q. Supposing that they were selling it and were just being paid a commission——

Mr. tum Suden: I think that is argumentative.

Mr. Farraher: I am trying to find the state of mind of this witness.

The Court: The trouble with that, Mr. Farraher, is that this type of question produces an argumentative answer, and it does not leave anything for the judge to decide.

Mr. Farraher: There is something to that.

Q. I will call your attention to page 5 of the complaint, paragraph 9: [111]

“Plaintiff never discovered that the state-

(Testimony of Ove Fog.)

ments and representations made to him by defendant to the effect that the defendant corporation had nothing to do with the sale and distribution of Harwood whisky in the said Western Division area and had not demanded or received any commissions or compensations for sales of such whisky so imported and sold."

Mr. tum Suden: What is the rest of it?

Mr. Farraher "Were false and untrue."

Mr. tum Suden: Until the latter part of January, 1948.

Q. (By Mr. Farraher): Until the latter part of January, 1948, according to your allegations, you did not know that Williams & Company had anything to do with the sale and distribution of Harwood whisky in your territory, is that so?

Mr. tum Suden: That is a broad statement, Mr. Farraher.

Mr. Farraher: It is just his language, Judge.

The Court: Don't you think again that whether or not the allegation of the complaint is sustained is a matter for the court to determine on the basis of the evidence, rather than to ask the witness?

Mr. Farraher: I think that is true. The only value to me is to have the witness' record of dodging it.

The Court: You should have, of course, a fairly wide latitude on cross-examination, but you can argue that yourself from the answers has already given, of course. [112]

(Testimony of Ove Fog.)

Mr. Farraher: This is preliminary, if your Honor please.

The Court: I would not restrict your right of cross-examination on it. You are dealing with a witness who wishes to argue, and when you ask that type of question you are going to get an argumentative answer. But you go ahead.

Mr. Farraher: I think your Honor is entirely correct. All I was fishing for was evasive answers.

Q. I notice, Mr. Fog, that nowhere in your complaint do you allege as part of the fraud—at least I have not found it—that at the time you signed that contract, you signed it on the representation of Mr. Jaburg that Williams & Company would not ship any goods into your territory under that contract, under the contract you made on March 8, 1946.

Mr. tum Suden: If it is not in there it is not in there.

The Witness: I beg your pardon? I do not know what you are asking.

Mr. tum Suden: He makes an observation and that is all. He does not ask a question.

Mr. Farraher: I thought I had a question mark.

The Court: Read the question.

(Record read.)

The Court: Of course, the contract speaks for itself, unless you had not finished your question.

Q. (By Mr. Farraher): Is that a fact?

The Court: I saw that already. You do not have

(Testimony of Ove Fog.)

to ask [113] the witness that. The contract referred to specific types of liquor only. It was not a general contract.

Mr. Farraher: That is right, and its provisions show specifically that he would get his commissions on liquor that was handled by the division.

The Court: Of course, that is a matter for argument. I do not think it will do much good to have the witness interpret the contract.

Mr. Farraher: No, I was just wondering whether it might have been an afterthought.

The Court: That, again, is a matter that you can argue. All attorneys have that hope, that sometime they will get a witness on cross-examination and he is going to admit he is wrong, and that he has no case, but that, in my experience, has not happened. It happens in the movies, sometimes.

Mr. Farraher: That is true, although I very often like to have the opposing witness say, "No," when naturally the answer would be "Yes."

The Court: We will recess until two o'clock.

(A recess was thereupon taken until two o'clock p.m. this date.) [114]

Afternoon Session, December 29, 1949

2:00 P.M.

OVE FOG

recalled.

Cross-Examination

(Resumed)

By Mr. Farraher:

Q. Mr. Fog, you were advised, were you not, that Mr. Jaburg was endeavoring to induce the Distillers to handle Harwood through the division in which you were employed? A. Yes.

Q. You have no reason to doubt that information? A. No.

Q. So far as you know, Mr. Jaburg did endeavor to arrange with the Distillers so that the Harwood goods shipped into the territory should go through your division? A. Yes.

Q. You had learned Mr. Koerner's connection with this matter. Did you interpret that to mean that Williams & Company—I am talking now before the settlement was made, before this meeting in which a settlement was made—did you assume that Williams & Company were shipping Harwood into your territory?

A. They were shipping it on behalf of the distillers. They were clearing it.

Q. Did you believe that Williams & Company was in fact shipping Harwood into this territory?

A. Will you define what you mean by “ship-

(Testimony of Ove Fog.)

ping''? If my answer [115] doesn't answer the question, I don't understand your reference.

Q. You have been in this liquor business a good many years and shipping is a pretty important part of that business, isn't it?

A. That is right.

Q. It has a regular definite meaning, shipping?

A. Yes.

Q. Did you prior to your discussions with Jaburg on the settlement know or believe that Williams & Company were shipping Harwood into your territory?

A. I was told that R. C. Williams was shipping it into this territory on behalf of the Distillers.

Q. And you believed that Williams & Company were shipping directly into this territory?

A. Not directly. What do we mean by directly?

Q. That Williams & Company was shipping directly into this territory.

A. Either you ship or you do not. What is directly? I don't understand that question.

Q. When this arbitration was about to be had, you prepared a statement of your view of the situation to present to the arbitration board, did you not?

A. I believe so.

Q. Have you a copy of that? [116]

Have you a copy of it, Mr. tum Suden?

Mr. tum Suden: May I see what you have there?

Q. (By Mr. Farraher): I will ask you to examine that and state whether or not that was prepared by you.

(Testimony of Ove Fog.)

A. Yes. I do not know if it was a letter that was sent to anybody. I think it was a draft that I made up.

Q. Was that prepared for submission to the arbitration board? A. No.

Q. I will call your attention to the last words.

A. It was made up at the time—yes, that is right, that is correct.

Q. Was that made up after consultation with your attorney? A. No.

Q. You prepared that on your own?

A. I, myself, yes, sir.

Q. I call your attention—and this was your view of the situation prior to the time that you met with Mr. Jaburg and discussed settlement of the matter?

A. Do you know the date of this?

Q. No, I have no date.

A. That must have been right after Mr. Jaburg had discussed, had suggested arbitration to me, after I had been back here and had the answer from Mr. tum Suden regarding arbitration, and then it had been established that it looked like we were going to have arbitration, and then I made this up. [117]

Q. I call your attention to the first page, at the bottom of the page, “Beginning in the autumn of 1944, the Wholesale Liquor Division of R. C. Williams & Company, Inc., made direct shipments into my territory of Harwood’s Canadian whisky, 90.4, in absolute violation of their agreement with me.”

A. Yes.

(Testimony of Ove Fog.)

Q. When I asked you if you considered prior to this settlement that Williams & Company made direct shipments, I was using the term as you used it here. A. Yes.

Q. What did you mean by that?

A. By that I mean R. C. Williams invoiced the merchandise into this. That is in my opinion a direct shipment. That is how I referred to this.

Q. From your observation of Mr. Koerner's activity and the information you got from your company, you drew the conclusion that Williams & Company, beginning in 1944, made direct shipments into your territory, is that right?

A. I don't know. I can't answer "Yes" or "No" on that, but I can explain the issue if I may.

Q. Can you answer that "Yes" or "No" and then explain, Mr. Fog?

A. If you will repeat.

Mr. Farraher: May I have the question read?

(Question read.)

A. Yes, that is right.

Q. (By Mr. Farraher): Now, Mr. Fog, I want to revert for a moment to the documents you signed that are dated March 8th. A. Yes.

Q. You will recall that when Mr. Ravaud sent you the documents to sign— A. Yes.

Q. In his letter of March 8, 1946—and I am referring to Plaintiff's Exhibit 17—he said, "As agreed between us, neither agreement is to be effective without the other." A. Yes.

(Testimony of Ove Fog.)

Q. You understood that, did you? That was the understanding?

A. That was the first time I heard about such a provision. That was never brought up at the time that Mr. Jaburg told me that he would try to get me the \$10,000. Anyway, I didn't pay much attention to it, because as far as I was concerned the issue was finished.

Q. Yes, but at the time you received this letter, which was shortly after March 8th, the matter was not finished because you did not finally sign——

A. No, it wasn't actually finished, but it was generally finished.

Q. You did not sign until the 26th of March, did you? A. Yes. [119]

Q. In the meantime you sent your letter of March 13th protesting the form of the agreement?

A. That is right.

Q. Your protest was that the agreement provided only for certain articles that were to pass through your hands, plus any other articles handled by the division? You objected to that, didn't you?

A. Yes, I think I have testified several times that I have always been assured that any merchandise shipped by R. C. Williams would go through my division.

Q. So when you sent your proposed amended form, you provided in your contract that anything shipped in by Williams & Company into this territory would come within your jurisdiction?

(Testimony of Ove Fog.)

A. I called attention that that is what we agreed upon in San Francisco.

Q. They refused to accept that amendment, did they not?

A. No, that was guaranteed. They didn't put it in the contract, but I was assured that that—had already been assured and it wasn't necessary to have it in the contract. As a matter of fact, I had it in writing. I had that guarantee in writing.

Q. You had that when?

A. I had that guarantee in writing from Mr. Jaburg.

Q. How long before?

A. I think that was in 1945.

Q. Yes, but in the beginning of 1946 you had not settled anything [120] yet, had you?

A. No, but we were trying to settle it.

Q. Exactly, and you suggested when this form of contract was submitted to you it should be made more comprehensive so as to cover shipments into the district by Williams & Company?

A. Yes, but that was not the big issue, as far as my principals are concerned, because they already had assured me that that was the foundation of my whole contract with R. C. Williams & Company.

Q. Then why did you want that put in your contract?

A. Because I thought it should be in the contract, and when I presented it to Mr. Ravaud he told me I already had that assurance—in fact, I had it in writing.

(Testimony of Ove Fog.)

Q. I call your attention, Mr. Fog, to the document which has been marked Plaintiff's Exhibit 17, which is the release upon which you were to receive the \$10,000. Will you hold that?

A. Yes.

Q. I call attention to this language:

"This will confirm our oral agreement of this week, to the effect that while we do not recognize any claim for any commissions on Harwood Whiskey sales in your territory, having previously advised you that Williams Importers has nothing to do with this product, we, in order to obviate any disagreement between us, will pay you the [121] sum of \$10,000 in full and final settlement of all claims which you have made and claims you might assert in the future on the sales of Harwood Whiskey in your territory, as long as this product is not directly handled by the Williams Importers Division."

Did you see that when you signed it?

A. Yes.

Q. What do you suppose they meant when they said, "As long as this product is not directly handled by Williams Importers Division?"

A. Because I had a guarantee, when it was handled by R. C. Williams, I would get my commission on it. But this draft of this thing, here, that is the way that R. C. Williams wanted to draw it up. When I got the \$10,000, I didn't make a

(Testimony of Ove Fog.)

deal with R. C. Williams. This was presented, like I made a deal with them. I finally wrote down and realized from Mr. Jaburg's assurance to me that I did not have no claim on Harwood whisky, and I got the \$10,000, and that has been thrown in, that I have settled a claim on my commission on Harwood's whisky for \$10,000, which is absolutely wrong.

Q. (By the Court): What were you getting the \$10,000 for?

A. I was getting the \$10,000 because I had suffered so much during these two or three years in my discussion with the company for getting the situation of Harwood whisky clarified, and Mr. Jaburg told me then that I did not have any [122] commission coming, and as I think I have testified before, I said, "Well, I do think that I should have something out of this because I have suffered quite a deal, and you are making quite a lot of money on it in New York on your wholesale."

Q. Do you mean you were suffering because you did not get your share of the proceeds on the Harwood whisky?

A. Not alone that, your Honor, but I was suffering a lot of heart—bad headaches in business out in my territory, due to the fact that I could not supply the people who helped me with the regular lines that at certain times was hard to sell. If they bought some of my other items, they wanted to be supplied.

Q. That was the same trouble everybody was

(Testimony of Ove Fog.)

having in those days. Everybody wanted whisky and couldn't get it. If you had whisky you could make them take a lot of other things along with it.

A. That is right, your Honor.

Q. That was the same headache that everybody had wasn't it?

A. Yes, but they didn't have the headache that I had, namely, the firm I am connected with are shipping it in to my territory but I am not making it available to the people that we do business with, leaving us no——

Q. You mean by that you could have done more business in the other lines of Williams & Company that you were handling if you were able to distribute some of that Harwood whisky, yourself, [123] is that what you mean?

A. Thousands of cases, your Honor, yes. The correspondence will show that I have lost carloads of merchandise because I couldn't supply Harwood whisky.

The Court: Excuse me for interrupting your examination. Go ahead.

Mr. Farraher: Perfectly all right, your Honor.

Q. Referring again to this language from this release: "As long as this product is not directly handled by Williams Importers Division—" Williams Importers Division never handled the product of Harwood, did they? A. No.

Q. I hand you what is marked Plaintiff's Exhibit 18, Mr. Fog, which is a letter of March 13,

(Testimony of Ove Fog.)

1946, from you to Mr. Ravaud. I will call your attention to this language at the bottom thereof: "I note the release form submitted only covers \$10,000, while it should read \$10,000 cash plus the \$3200 tax free at this time remaining on your books against me." What did that refer to?

A. Well, that referred to a debit I had with R. C. Williams.

Q. (By the Court): You mean you owed them \$32,000?

A. Yes.

Q. (By Mr. Farragher): As a matter of fact, shortly after you went to work for them you made a personal loan from them of \$15,000 without interest? [124]

A. That is right.

Q. And this is a remnant of that loan?

A. That is right.

Q. Do I understand from this that you were objecting to the release covering the \$10,000, the release form, because you had agreed upon more than \$10,000?

A. As far as I remember it, the amount that Mr. Jaburg would give me would amount to \$10,000, plus whatever money that I owed the company, and at that time that happened to be, as it says here, \$3200.

Q. You did not receive that, did you?

A. No.

Q. You received just the \$10,000?

A. That is right. Well, yes and no.

(Testimony of Ove Fog.)

Q. Before I get into a little longer piece of cross-examination here, there was some mention made of the fact that you were employed by Schenley and that you resigned your position with Schenley to come with this company.

A. That is right.

Q. And the company assured you the business here would improve and your compensation on a percentage basis would amount to something?

A. Yes, sir.

Q. And I think you said you were receiving \$400 a month from Schenley? [125]

A. No. Did I say that?

Q. How much were you receiving?

A. I don't remember, but it was \$400 or \$500, between there.

Q. There was no commission attached to it, was there?

A. No, but there was a bonus. I was the head of a division.

Q. You got a bonus of how much?

A. Well, I didn't get it, because I resigned before I had time enough to be there long enough.

Q. But you had no commissions on your sales?

A. No, Schenley don't give commission on sales.

Q. You took this job at \$350 a month.

A. This job, here?

Q. Yes. A. No.

Q. Your first salary was \$350?

A. Is that what it was? Then that is right.

Q. Approximately.

(Testimony of Ove Fog.)

A. That was the guarantee, what I could draw monthly, but that was a minor part of the remuneration I was going to get.

Q. As a matter of fact, you were employed in 1942, and in 1943 and 1944 the least you earned was \$21,000 working for this company?

A. That is possible. But may I call your attention, so the Court might understand the situation—

The Court: I prefer that you do not do that, because [126] then you are making arguments to me and I do not like to hear a case and have the witness make arguments.

The Witness: Pardon me.

Q. (By Mr. Farraher): You mentioned the fact that you resigned in 1947, April, 1947?

A. Yes.

Q. You were asked to resign, I think you said.

A. That is right.

Q. Was there much business in your line in 1947?

A. No, business was pretty small.

Q. Practically nothing, wasn't it?

A. It was very difficult, except it was possible to sell whisky.

Q. In other words, the stores had been so filled up by tie-in sales of wines and rums, you could sell whisky if you had it, but you could not sell rum?

A. The market was in distress.

Q. At the time you resigned that, you did that by written resignation, did you not? A. Yes.

(Testimony of Ove Fog.)

Q. To refresh your memory, I will show you a letter so as to fix the date. I will show you a letter of April 25, 1947, which purports to be a letter in which you resigned from Williams Importers. Does that fix the date, approximately?

A. I am quite sure, sir. [127]

Q. Was any settlement made with you at that time of any kind? A. Settlement?

Q. Yes.

A. Well, if you call it a settlement, I had a contract with them running for a year, and there was so many months to expire, and I got pay for those months; otherwise they paid my guarantee and then I got a settlement.

Q. I will show you, Mr. Fog, a letter dated April 26, 1947, from Williams Exporters to Fog. Do you recall the occasion of that?

A. Yes, if I may look at it. Yes. May I see it again, if you ask me some questions about it?

Q. Yes. Just let me take a glance. I will give it right back to you. I read this portion of it:

“Confirming our conversation, as special compensation for past services I am paying to you with this letter a check in the sum of \$6000. Furthermore, on January 2, 1948, we will pay you an additional amount of \$6000. These payments, in full settlement of our account with you, cover all past and future possible claims.”

You knew that provision was in there when you signed that document? A. All claims?

(Testimony of Ove Fog.)

Q. Yes.

A. Yes, I did. I had no claims against R. C. Williams except [128] after I learned that they misrepresented matters to me. Just then did I have a claim against Williams, and I first learned that in 1948. So why should I sign—I had no claim whatsoever against them.

Q. In that year the business, as you say, was very stagnant? A. Yes.

Q. This payment was made to you, \$6000, for your services up to date, \$6000 by way of a settlement?

A. Am I allowed to ask—Are you familiar with—

The Court: Mr. Farraher, some of these questions result in these argumentative answers.

Mr. Farraher: I will withdraw it, your Honor.

The Witness: I would like to—

The Court: No, no, I have enough trouble right now to sift the facts from this mass of argumentative statements to do a good job in deciding the case without hearing more.

Q. (By Mr. Farraher): On or about the 26th of March, referring to this settlement that was dated March 8th—the settlement finally was made on the 26th of March, was it not? Does that fix the date in your mind?

A. This is a payment of salary in accordance with the contract I had with R. C. Williams. It is not a settlement. It is just that they are making the payment of their remaining months.

(Testimony of Ove Fog.)

Q. I think you misunderstood. This is 1946.

A. Pardon me. Yes.

Q. I notice on here it says, "In full settlement in accordance with agreement dated March 8, 1946." You were paid by voucher checks, weren't you?

A. Yes.

Q. Do you recall that that was the claim——

A. I am not disputing that.

Q. Calling your attention to Plaintiff's Exhibit 14—this is the document, your Honor will recall, that was called the reassurance—this is addressed to you and says, "This will confirm our conversation held in December, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Company, Inc., except through the Continental Import Division, now Williams Importers. Very truly yours, Williams Importers."

That is the document you referred to as giving you written assurance that they would not ship anything into your territory?

A. This is only a confirmation of it.

Q. Yes.

A. The assurance that nothing would be shipped into my territory was given to me at the time I was employed by Mr. Ravaud. Mr. Ravaud explained to me——

The Court: I think the witness has already answered the 130 question.

Q. (By Mr. Farraher): And that was in December, 1943?

A. This was.

(Testimony of Ove Fog.)

Q. Stated here. A. Oh, yes.

Q. The assurance was originally made in 1943 and this is a confirmation of it?

A. That is right.

Q. This in a confirmation of what was said in 1943; that was given you after your request of Mr. Jaburg that it be done?

A. After I asked Mr. Jaburg.

Q. That is right, and there was no hesitation on Mr. Jaburg's part to do that, was there?

A. No.

Q. And at the very time you did this, you were starting the arbitration proceedings for the purpose of settling your claim for the commissions on Harwood? A. Pardon me. I am starting?

Q. Yes, the negotiations for arbitration. I will withdraw that.

The Court: I think the record already shows it, Counsel.

Mr. Farraher: That is true, if your Honor please. I think that is about the end, but I would like to consult with counsel first.

The Court: Very well, go ahead.

Mr. Farraher: That is all. [131]

Redirect Examination

By Mr. tum Suden:

Q. Mr. Fog, at the time that you were served by Mr. Gaines, of the Internal Revenue Department, with the subpoena to produce certain letters,

(Testimony of Ove Fog.)

those were the letters which you had taken with you to New York? A. Yes.

Q. Did Mr. Gaines specify what letters he wanted?

A. Yes, he took out four or five letters.

Q. He went through all the letters you had and got what he wanted? A. Yes, sir.

Q. He did not specify that he wanted a letter of a certain date or anything of that kind?

A. No, but he showed me one particular letter that he had that he wanted information about, and I gave it to him.

Q. Did you take out these letters prior to resigning from R. C. Williams & Company, with any thought of bringing an action against R. C. Williams & Company?

A. I hadn't looked at the letters since I came back from New York in March. I have never even looked at them, but they happened to be in my drawer, in my desk.

Q. The first time that you had discussion to look for those letters was when you were subpoenaed?

A. The first time I had occasion to look for them was after I had been up to the Internal Revenue and I learned that R. C. [132] Williams was selling the merchandise.

Mr. Farraher: I would like that last stricken out, "I learned," as the conclusion of the witness.

The Court: Yes, it may go out.

The Witness: May I consult with Mr. tum Sunden?

(Testimony of Ove Fog.)

The Court: I think he wants to talk to you about something.

The Witness: I would like him to ask me some questions.

The Court: After he has finished asking you questions then you can consult with him. He may or may not want to follow your advice.

Q. (By Mr. tum Suden): Mr. Fog, in regard to this arbitration or suggested arbitration, when was arbitration first suggested to you? Do you recall the date?

A. Yes, arbitration was suggested to me in New York in 1945, in September, 1945, when Mr. Jaburg gave authorization to Mr. Ravaud to confirm the arrangement by which all merchandise should go through my office.

Q. And at that time did Mr. Jaburg state to you that there was no commission coming to you on Harwood? A. Yes, he did.

Q. And he gave to you the reasoning?

A. Mr. Jaburg said that—the first thing he said was that Williams Importers didn't handle it. Then we called this to his attention and he said that is a different deal, we don't [133] sell it.

Q. Did you say anything to Mr. Jaburg in regard to arbitration as to your desire to consult an attorney?

A. When Mr. Jaburg suggested arbitration, I told him I didn't know much about arbitration in this country, but I would like to——

(Testimony of Ove Fog.)

The Court: I wonder if you couldn't ask the witness to answer those questions a little more directly. It is very difficult for me to follow. You ask a question that calls for a simple "Yes" or "No" answer. The witness gives a long answer and I finally find myself in the position of not knowing whether he answered that particular question or not.

(To the witness): Please listen to the questions and then answer them as best you can directly. This is for your own benefit.

(The last question was read.)

Q. (By the Court): You can answer that "Yes" or "No." Did you? A. Yes.

Q. Now, if he wants you to tell what you did tell the attorney, he will ask you that.

Q. (By Mr. tum Suden): Did you consult any attorney? A. Yes.

Q. Whom did you consult?

A. I consulted you.

Q. When you returned from New York? [134]

A. That is right.

Q. What inquiry did you make of me?

Mr. Farragher: Just a minute, if your Honor please. That certainly would be hearsay.

Mr. tum Suden: I do not think so.

The Court: It is a self-serving statement. It wouldn't make any difference what he asked you.

Q. (By Mr. tum Suden): Did you at the time you consulted me state the facts in regard to the

(Testimony of Ove Fog.)

sale of Harwood whisky by R. C. Williams as you knew them?

Mr. Farraher: We have no objection if he wants to ask for the conversation. We will waive the hearsay phase if counsel wants to bring out the conversation.

The Court: I do not understand whether you are objecting or not.

Mr. Farraher: No, I am withdrawing it.

Mr. tum Suden: I just want to bring out the conversation.

Q. What conversation did you have with me with regard to the Harwood question?

A. I came to you to ask your advice, what was the best way of finding a solution in my discussion with Mr. Jaburg, whether arbitration would be the right way to do it.

Q. Did you at that time know that R. C. Williams were selling and shipping Harwood whisky into your territory? A. I did not. [135]

Q. The information that you had with regard to Harwood whisky, is that set forth in the letter which you wrote to Mr. Ravaud, that long letter?

A. That is right.

Q. Did you see or meet any salesmen in your territory who were selling Harwood whisky?

A. No.

Q. How were sales of whisky generally made at that time?

A. You are referring to Harwood?

(Testimony of Ove Fog.)

Q. No, whisky.

A. Any whisky. It didn't take any salesmen to sell whisky at that time. They were all trying to get as much whisky as possible. So salesmen were kind of unnecessary.

Q. When you wrote that letter or statement headed "To Whom It May Concern," did you at that time know whether or not R. C. Williams were actually selling or shipping Harwood whisky into your territory? A. I did not know.

The Court: I am a little bit in the dark now. What statement is it that you are now referring to? Is it in evidence?

Mr. tum Suden: I do not think it is in evidence.

The Court: There is no way of identifying it then. I think I recall it is a statement he prepared, you said, for submission to arbitration.

Mr. Farraher: For submission to arbitration.

The Court: I think you had better have it marked for [136] identification so you will have something in the record to indicate what it is we are talking about.

Mr. Farraher: I have a copy we can have marked for identification.

Mr. tum Suden: It was not sent to anybody. It was just something he wrote for his own information.

The Court: I am only suggesting that there be something in the record to show what it is we are

(Testimony of Ove Fog.)

talking about. Otherwise we won't know at a later time. Mark it for identification.

(The document referred to was thereupon marked Defendant's Exhibit C For Identification.)

DEFENDANT'S EXHIBIT C

231 Sansome Street

To Whom It May Concern:

On May 1, 1942, the writer was employed by Continental Import Division, now Williams Importers, a Division of R. C. Williams & Co., Inc., New York, as West Coast Manager, having jurisdiction over the eleven Western States, Honolulu and Alaska.

I accepted my position with Williams Importers based on a gentleman's agreement, providing a minimum salary plus a stipulated commission per case on all items sold and shipped into the territories allotted to me. My commission agreement reads as follows and is payable monthly for the previous month's number of cases sold, paid for and shipped into my territory:

From 1,000 to 5,000 Cases—.10 a case.

From 5,000 to 10,000 Cases—.15 a case.

From 10,000 to 15,000 Cases—.20 a case.

Over 15,000 Cases—.25 a case.

Beginning in the autumn of 1944, the Wholesale Liquor Division of R. C. Williams & Co., Inc., made

(Testimony of Ove Fog.)

direct shipments into my territories of Harwood's Canadian Whiskey, 90.4, in absolute violation of their agreement with me. All efforts to obtain the commission rightfully due me on such shipments have so far been in vain, and my Company's refusal to adhere to our agreement as entered into has resulted in this case being brought before your Honorable Board.

In September, 1945, when Mr. Jean Ravaud returned from Europe, I traveled to New York for a conference of the matter with Mr. Ravaud and Mr. Hugo Jaburg, President of R. C. Williams & Co., Inc., i.e., Williams Importers.

In this conference I made again a specific demand for commission on all cases of Harwood's Whiskeys already shipped, or which might in the future be shipped into my territories, in accordance with my gentleman's agreement with them. My efforts to settle this matter again failed. Then Mr. Jaburg suggested to me that we submit our controversy for arbitration. I had no choice but to accept this suggestion, though I was at a complete loss to understand any sound reason for arbitration of a matter so obviously plain. Our agreement has been in effect and functioning since 1942 on a basis which has proven satisfactory and agreeable to all concerned until this controversy arose concerning the Harwood's Whiskey.

The Harwood sales are a direct repetition of a previous occurrence (this time pertaining to Rum)

(Testimony of Ove Fog.)

which came up in the autumn of 1943 and was settled favorably. Therefore, you may find my following writing, referring to this previous issue, most important to your judging of this present matter.

With reference to the previous controversy, allow me to explain that in the early autumn of 1943 the Wholesale Liquor Division of R. C. Williams & Co., Inc., made direct disposal of a couple of carloads of Rum into part of this territory, namely, San Francisco. When Mr. Ravaud shortly after this visited me in San Francisco I brought this matter to his attention and told him that this transaction, to my mind, was a definite violation of our agreement, and absolutely contrary to my understanding of this agreement. Mr. Ravaud stated that he fully agreed with me and that he would take this matter up with our President, Mr. Hugo Jaburg.

In late September, 1943, when I again met Mr. Ravaud, he advised me that he had taken the matter up with Mr. Jaburg and that Mr. Jaburg had guaranteed him that such a thing would not happen again; that positively no further merchandise would at any time shipped into any part of my territories by R. C. Williams & Co., Inc., except through the Continental Import Division, now Williams Importers.

In other words, had there been any possible doubt as to the mutual understanding of our agreement, there was most certainly ample opportunity to have corrected it at this time. Accordingly, it is my con-

(Testimony of Ove Fog.)

tention that this issue, which now involves Harwood's Whiskey, was tested and settled when the matter of the Rum sales was decided in my favor and my principals agreed that my contract would stand as originally entered into.

When I acceded to Mr. Jaburg's desire to arbitrate our controversy, I did so with the understanding that I was to receive from them written confirmation of our verbal agreement to the previously mentioned assurance given me by Mr. Jean Ravaud on behalf of Mr. Jaburg. This confirmation given me by letter, dated September 13, 1945, (signed by Jean Ravaud) reads as follows, quote:

This will confirm our conversation held in September, 1943, at which time I gave you my verbal assurance that no merchandise would be shipped into your territory by R. C. Williams & Co., Inc., except through the Continental Import Division, now Williams Importers. Unquote.

For your further help in judging this controversy, I am enclosing copy of a letter I received from my firm, dated February 6, 1945, and my answer, addressed to Mr. Jean Ravaud, dated February 12, 1945.

If we compare the Harwood's issue with the Rum issue we will find that the commercial and ethical principles involved are identical. In the Rum matter, my employers judged my claim a correct one. In the Harwood's case (which is identical with the Rum case) they reverse their decision; and a man

(Testimony of Ove Fog.)

can hardly be expected to accept such an inconsistent ruling, which interferes so drastically with his livelihood.

I refuse to believe this matter would have ever reached the point of arbitration had not Mr. Jaburg and Mr. Ravaud been occupied with other matters.

The issue involved seems to me so clear cut that unless your Honorable Board requests additional details from me to substantiate my claim (which amounts to 25 cts. commission for every case of Harwood's Whiskey already shipped, or which will be shipped, into my territories) I shall refrain from further comments.

I base my claim solely upon my original 1942 agreement, and the confirmation of this agreement, as substantiated by my principals in December, 1943.

Mr. tum Suden: He might point out that that paper was not communicated to anybody. It was simply something he wrote out, his reasons or arguments.

The Court: I understood that. All I was pointing out was there was nothing in the record to show what you were referring to in the question you put to the witness.

Mr. Farraher: It was, however, prepared for the purpose of submitting it to arbitration.

The Court: You read a paragraph from it, but

(Testimony of Ove Fog.)

still the statement, itself, which counsel referred to as being headed, "To Whom It May Concern," is meaningless unless it is identified in the record.

Mr. Farraher: That is right, your Honor, yes.

The Court: Go ahead.

Mr. tum Suden: May I see that document?

The Court: That is my only purpose in interfering.

Q. (By Mr. tum Suden): Referring to the bottom of that page, you mention in this exhibit Defendant's C For Identification a statement that R. C. Williams made direct shipments into your territory of Harwood's whisky and in violation "of your agreement with me." Did you at that time know that to be a fact, or was that your conclusion?

A. That was my conclusion.

Q. That was the basis of your contention?

A. That is right, but I was told by Mr. Jaburg that they were not.

Q. This document that you prepared was an argument, was that not it?

A. That is correct.

Q. And your viewpoints?

A. That is right.

Q. Did it necessarily——

The Court: I can't follow this witness on that.

Q. Do you mean to say you made that statement for the purpose of getting some benefit to yourself without knowing whether or not that statement was true? You said in the statement that

(Testimony of Ove Fog.)

they were making shipments here in California. Now, you made that statement in the hope of getting some benefit to [138] yourself. Were you telling the truth when you said that, or were you just pulling that out of the air?

A. When I wrote this, it was my belief that they were shipping it.

Q. Then you must have had some information. You did not have a dream some night when you were in bed, did you?

A. I had no information about it excepting what I already had been——

Q. You did not know whether that was true, or not, you mean? A. I did not.

Mr. tum Suden: This was a statement, as I understand it, that he intended to submit as his theory for why there should be arbitration.

The Court: All right, go ahead.

Mr. Farraher: To the arbitration board.

Q. (By Mr. tum Suden): When you resigned from R. C. Williams, that was done at their request, was it? A. Yes, sir.

Q. When you resigned R. C. Williams agreed to make two payments of \$6000 each to you, when you resigned in 1947?

A. No, I asked them to make it that way.

Q. That was the balance of your yearly salary?

A. That is right.

Q. And there was no provision for commission, on sales?

A. No, it was just fulfilling their contract. [139]

(Testimony of Ove Fog.)

Q. And the settlement that you made and signed at that time covered that particular contract, did it not? A. Yes.

Q. When you signed that document in which you said, "Settlement in full for all future claims——"

A. Yes, sir.

Q. Did that refer only to the period of that contract?

Mr. Farraher: We object to calling for the conclusion of the witness. The document, itself, speaks for itself.

The Court: I think that objection is good, Counsel.

Q. (By Mr. tum Suden): At the time you signed that receipt for that money, did you at that time know that R. C. Williams were shipping and selling Harwood whisky in your territory?

A. I did not.

Q. Referring again to Defendant's Exhibit C For Identification, referring to the statement that you had in this memoranda that Williams & Company were making direct shipments into your territory, can you fix the time that you wrote that?

A. That must have been the time after I came back from New York and Mr. Jaburg suggested we should have an opportunity, and I took it up with you.

Q. Why did you make that statement in this document?

A. I made that statement because at that time

(Testimony of Ove Fog.)

I believed that they were shipping it into my territory.

Q. Why did you believe that? [140]

A. Because Harwood was coming into my territories, and in talking with my different customers it looked sensible that they were shipping it in.

Q. At that time you believed they were shipping it in?

A. At that time I believed it.

Q. Subsequent to that time did you take it up again with officers of R. C. Williams & Company?

A. Yes, when I came back Mr. Jaburg came out here, I think it was in February——

Q. The Palace Hotel?

A. The Palace Hotel—he then convinced me that they were not selling it, and that was the time when the whole thing was called off.

Q. In other words, he satisfied you——

A. He satisfied me again it was not——

Q. Well, now—go ahead.

A. He convinced me I had no commission coming and they were not selling it. I think I have testified to that.

Mr. Farraher: I move to strike out what he was convinced.

The Court: That objection is good. It will be sustained.

Q. (By Mr. tum Suden): Did he make a statement to you at that time in regard to the method that R. C. Williams followed in handling Harwood whisky?

A. Here in San Francisco?

(Testimony of Ove Fog.)

Q. Subsequent to preparing that document, either in San Francisco [141] or in New York, or any other place.

A. Do you mean before I wrote that document?

Q. No, afterwards, after you wrote that document.

A. After I wrote that document he told me they were not handling it.

Q. (By Mr. Farraher): Did he say, "he"?

The Witness: That they were not handling it.

Q. (By Mr. tum Suden): And that was reiterated at the time you were in New York and the documents of March 8th were signed?

A. Yes, that is right.

Mr. tum Suden: I think that is all.

Recross-Examination

By Mr. Farraher:

Q. At the time you made the statement that Williams & Company were making direct shipments, you had had all of your discussions with the company, both with Mr. Jaburg and with Mr. Ravaud and with Mr. Koerner, as to the methods of handling Harwood whisky in this territory, hadn't you?

A. I never did get any information of handling it, outside they told me they were clearing it. That is the reason why this case is in court today.

Q. Just what convinced you at the time you prepared this exhibit C that Williams & Company were shipping direct into this territory? Just what?

(Testimony of Ove Fog.)

A. The fact that the Harwood whisky was coming in and the [142] Harwood whisky was invoiced by R. C. Williams & Company.

Q. That is what made you think it was a direct shipment? A. That is right.

Q. You interpreted those facts to constitute a direct shipment? A. That is right.

Q. At the time you made the settlement with Mr. Jaburg you knew then as well, didn't you, that the whisky that was shipped in here was invoiced by Williams & Company?

A. I knew it was invoiced, but I was told it was on behalf of the Distillery and R. C. Williams was clearing it. They had never used the word, they never told me at no time, which would have been very simple, that they had sold the merchandise, just like they sold it in metropolitan New York. Then there never would have been any dispute. That word had never been used.

Q. But they did convince you prior to the time you prepared Exhibit C that they were shipping Harwood into this territory?

A. Do you mean before?

Q. Certainly, before you prepared this exhibit in which you say they are shipping into this territory.

A. That they what? That they convinced me?

(Question read.)

A. No, they didn't convince me. It was a fact that Harwood was coming into this territory, but it

(Testimony of Ove Fog.)

was shipped into this territory by R. C. Williams on behalf of the Distillery. [143]

Q. And you knew it was invoiced by R. C. Williams & Company and was in fact shipped by the distiller from Vancouver into this territory? You knew that?

A. I knew it was invoiced by R. C. Williams, yes.

Q. And you knew it was being shipped from the Vancouver distillery, didn't you?

A. Yes, sir.

Q. And you knew both of those facts at the time you made the settlement? A. Yes.

Q. You made one other statement there: You said that after you prepared this you had a talk with someone who told you they were not handling it. Who was that? You testified just a moment ago that after preparing this Exhibit C you saw someone and he told you that they were not handling Harwood.

A. I understand the question. I am referring to my conversation in the Palace Hotel.

Q. With whom?

A. With Mr. Jaburg and Mr. Ravaud. I think I have testified already to that.

Q. What did you mean by "handling"? What did you interpret the word "handling" to mean when they told you they were not handling Harwood?

A. That was the term they used, and that means

(Testimony of Ove Fog.)

again they had just cleared it. In other words, they never brought it [144] down to the point, which would have been very plain, to say "We do sell it." They never used that word.

Q. Did you ever ask them whether or not they shipped any Harwood into this country at any time?

A. If they shipped?

Q. Yes, using your word "shipped." Did you ever ask them if they shipped Harwood into this territory?

A. No, I used the word "selling," because it was shipped in here we know.

Q. (By the Court): Let me ask you this question: At all of the times we are discussing here this whisky came from Canada to the wholesalers in California and other parts of your territory directly?

A. Yes.

Q. The whisky, itself?

A. That is correct.

Q. The defendant, R. C. Williams & Company, invoiced, sent out invoices to the wholesalers, is that right?

A. That is correct.

Q. You say that if, for example, the defendant had paid \$20 a case to the distiller and invoiced at \$21.50 a case to the wholesaler, that that would be different than if the distiller paid the defendant \$1.50 for invoicing it a case, is that what you are intending to state?

A. Yes, your Honor. [145]

Q. You have been attempting to make that dis-

(Testimony of Ove Fog.)

inction, I gather, from your answers that you have been making to the attorneys right now, is that right? A. May I try to explain that?

Q. I do not want you to explain it. See if you can answer my question: Is that the distinction that you are making, or have been attempting to make? I am not trying to help you out. I am trying to find out what is in your mind.

A. The distinction I am getting at is that R. C. Williams, if they are clearing the merchandise for the distillery, which they claim they did, then they are acting as an agent, just like I am acting here.

Q. All I am trying to find out is the distinction that you are making in the difference between the R. C. Williams & Company paying the full purchase price of the whisky to the distiller, adding \$1.50 to it, and invoicing to the purchaser, and the payment of \$1.50 commission by the distillery to the defendant for the invoicing process that the defendant adopted? Is that the distinction that you are making? If it is, just admit it, because I am familiar with those processes. There isn't anything mysterious to me. The distinction you are making is the difference between the defendant paying the full purchase price and adding a profit or an additional amount when they sell it, and that differential being paid as a commission directly: That is the distinction that you are making? [146]

A. That is the distinction.

Q. And if they got a commission from the dis-

(Testimony of Ove Fog.)

tiller, then you do not think you are entitled to any part of the \$1.50 that they would get as a commission for their services in billing, whereas if they paid the price themselves and then rebilled to the wholesaler for the difference of \$1.50, you would be entitled to your commission?

A. That is correct.

Q. That is the point you are making?

A. That is the point.

Mr. Farragher: Could I have one more question?

The Court: Yes, certainly.

Q. (By Mr. Farragher): You knew at all times from the fall of 1944 that Williams & Company were the importers of the whisky, didn't you?

A. As soon as the merchandise——

Q. Answer "Yes" or "No." You can answer that "Yes" or "No," please.

A. I knew in 1944, when the first shipments came in here, it was imported by R. C. Williams. That is when I learned that R. C. Williams was the importer.

Q. You knew that at all times?

A. As soon as it appeared on the market.

The Court: Anything else with the witness?

Mr. tum Suden: Not from this witness, no. If the Court [147] pleases, in connection with this case I wish to call attention to the fact that in the answer of the defendants they admit, on page 4, the allegations of the complaint, paragraph 7 of the answer, they admit the selling of the whisky in the

(Testimony of Ove Fog.)

United States. They admit the amounts set forth in the complaint, except as to the amounts which were to have been sold outside of certain states, and they said that they did not sell in excess of 96,592 cases of Harwood whisky in the States other than California, Nevada, Arizona, and the Territory of Alaska. Then going down to paragraph 8 of the answer, they admit that for more than a year prior to March 8, 1946, the controversy was pending, but in this connection they allege that the whisky was not sold by plaintiff or through the Continental Import Division, or said Williams Importers. They then proceed on in that paragraph and state at line 4:

“In this connection defendant alleges that it did import and sell throughout said area Harwood whisky and did receive a profit on the sale thereof,”

but draw the distinction that the sales were made through the department other than Continental Import Division. The allegations admit the sale of the liquor by R. C. Williams. I assume that there is no necessity of proving that fact.

The Court: Well, except they admit it up to 96,592.

Mr. tum Suden: Except as to the amount, they admit the sale of 405,000 cases in Nevada, California, Oregon and [148] Washington, I think it is. However, I think it might be helpful to the court, in spite of the admissions of the answer, that the

(Testimony of Ove Fog.)

contract by which Harwood functioned in the handling of this whisky might be offered in evidence, and I have asked Mr. Jacobs for a copy of that contract, and I have received a copy of that contract, and in order to give the court the information, I would like to offer that contract in evidence.

The Court: A contract between the defendant, R. C. Williams & Company, and the Harwood Distillery?

Mr. tum Suden: It appears from that contract, if it is the correct contract, that it is a contract between the defendant and a corporation in Cuba, which claims to have had the complete control of the sale of Harwood whisky throughout the world.

The Court: For the Harwood Canadian Distillery?

Mr. tum Suden: And this contract appoints R. C. Williams the selling agent for it in the United States, fixing the prices and their commission.

The Court: Any objection to the contract?

Mr. Farraher: No, we have the original here. There is no objection to it. We are handing Counsel, if your Honor please, the original of an agreement dated April 18, 1944, between Agencias Distiladores, S. A., or Distillers Agencies, Inc., a corporation, on the one part, and R. C. Williams & Company, Inc., upon the other, executed by the officers of each corporation, and a supplemental contract in letter form [149] dated April 20, 1944, addressed to Agents, Agencias Distiladores, S. A.,

(Testimony of Ove Fog.)

signed Williams & Company by its officers, and approved by the Agencias Distiladores, through its officers.

The Court: Do you want them marked as one exhibit?

Mr. tum Suden: I think they might be marked as one exhibit, if the Court please.

(The agreements referred to were received in evidence and marked Plaintiff's Exhibit 20.)

PLAINTIFF'S EXHIBIT No. 20

Agencias Distiladores, S. A.

(Distillers Agencies, Inc.)

and

R. C. Williams & Company, Inc.

AGREEMENT

Parties.

Memorandum of Agreement made this 18th day of April, 1944, by and between Agencias Distiladores, S. A. (Distillers Agencies, Inc.), a corporation duly organized under the laws of the Republic of Cuba, of 411 Aguiar Street, Havana, Cuba, hereinafter called "Supplier," and R. C. Williams & Company, Inc., a corporation duly organized under the laws of the State of New York, U. S. A., of 265 Tenth Avenue, New York City, New York, hereinafter called "Agent."

(Testimony of Ove Fog.)

Witnesseth:

Whereas, the Supplier is the exclusive agent of Duncan Harwood & Co., Ltd., of Vancouver, Canada, for the entire world for the sale and distribution of the brand "Harwood's," a blended Canadian whiskey of 90.4 proof, distilled, blended and bottled by the said Duncan Harwood & Co., Ltd., under the supervision of the Canadian Government; and

Whereas, it is the intention of the parties hereto that the Supplier appoint the Agent as its exclusive sales and distributing agent for the sale of the said brand of "Harwood's" in the United States of America, subject to the terms and conditions of this agreement;

Now, Therefore, in consideration of these presents, and for other good and valuable considerations, the parties hereto mutually covenant and agree as follows:

Authority of Supplier to Appoint Agent.

First: The Supplier warrants and represents that it is the exclusive agent of Duncan Harwood & Co., Ltd., Vancouver, British Columbia, Canada, for the sale and distribution of whiskey under the brand name of "Harwood's" for the entire world and has the power and authority to enter into this contract with the Agent and to appoint the Agent as exclusive sales and distributing agent for the territory and term hereinafter set forth.

(Testimony of Ove Fog.)

Second: The Agent warrants and represents that:

Authority of O. P. A. Prices.

(a) it has or will obtain the necessary permits and licenses to enable it to carry out the agency herein granted and further

(b) it has obtained an order from the Office of Price Administration dated March 14, 1944 (Order No. 34) setting forth the maximum prices for sales to wholesalers, monopoly states and retailers for the sale of said "Harwood's" Whiskey, which approved prices warrant the prices set forth in this agreement.

Exclusive Agency and Territory.

Third: The Supplier appoints the Agent as its exclusive agent to distribute the brand of blended Canadian Whiskey under the label of "Harwood's" for the territory comprising the United States of America, that is, the states in which the distribution and sale of alcoholic beverages is now and/or will in the future be permitted and licensed.

Term.

Fourth: This agreement shall terminate and end with the abolition or discontinuance of the Office of Price Administration in the United States, or when the Office of Price Administration relinquishes and ceases pricing of imported whiskies, whichever is the sooner. The period from the date of this agree-

(Testimony of Ove Fog.)

ment until the happening of either of such contingencies shall be the term of this agreement.

Price.

Fifth: The price to be paid by the Agent to the Supplier for the said "Harwood's" Canadian Whiskey shall be \$19.05 per case of 12 bottles of fifths (four-fifths American quarts) at 90.4 proof, f.o.b. Vancouver, British Columbia, Canada, in funds of the United States of America, net, without discount for quantity or payment. It is agreed that the Supplier will give no commissions, allowance or remuneration of any kind to the Agent, it being the intention and agreement of the parties hereto that the Agent will make the profits hereinafter set forth as and for such commissions, allowances or remunerations for its efforts and services.

Strip Stamps.

Sixth: Strip stamps, necessary and requisite under the laws of the United States, will be furnished by and at the cost of the Agent.

Passing of Title.

Seventh: It is understood and agreed that title to all shipments from the Supplier to the Agent shall pass f.o.b. Vancouver, Canada, and the Agent assumes all risk of loss after the merchandise is loaded on railroad cars at Vancouver, B. C., and a railroad bill of lading is issued for such shipment. Importations in Name of Agent.

(Testimony of Ove Fog.)

Eighth: All importations into the United States shall be in the name of the Agent which shall make all customs entries therefor. The Supplier, at its cost and expense, shall attach a strip or add to the label words as follows:

“Imported by R. C. Williams & Co., Inc.

265 Tenth Avenue

New York, N. Y.

Sole Agent for the U. S.”

Where State Laws make it necessary to affix a strip or label showing the name of the licensee in the said state, same shall be affixed by the Supplier at the Supplier's cost and expense, on the written instructions of the Agent, such strip or label to contain the name of the wholesale customer of the Agent in such state. Whenever whiskey is already cased, in such event the customer of the Agent, pursuant to the laws of the State in which the customer is located, shall affix his own strip or label at his own cost and expense.

Posting of Schedules, etc.

Ninth: The Agent shall post schedules of prices or other schedules, labels or listings wherever necessary and required and shall conform to all rules, regulations and orders of the various federal, state and other bodies having jurisdiction over the activities of the Agent in carrying out the terms of this agreement and, further, that this agreement shall be subject to all such rules, regulations and orders.

(Testimony of Ove Fog.)

Minimum Quantity for Retail Distribution by
Agent.

Tenth: It is understood and agreed that the Agent is to purchase and receive a minimum of 121½% of all the "Harwood's" brand as aforesaid shipped into the United States, such minimum of 121½% to be sold and distributed by the Agent to its retail customers in Metropolitan New York City. An additional quantity of a minimum of 121½% is to be sold and distributed to wholesalers in the State of New York (other than the Agent) and the balance of 75% is to be sold and distributed to wholesalers and monopoly states in the remainder of the territory hereinbefore set forth (the State of New York excepted).

Eleventh: Notwithstanding the maximum prices set forth in the order of the Office of Price Administration hereinbefore set forth, the Agent agrees that it will make sales of "Harwood's" to wholesalers on the following basis:

\$20.77, net, per case, f.o.b. Vancouver, Canada, in bond, which price is made up of the total of

- (a) cost of \$19.05
- (b) strip stamps of 12c, and
- (c) profit of \$1.60

and that all sales to wholesalers will be at a (stop) price not to exceed the said price of \$20.77 per case; the wholesaler (when goods are already cased) to affix State Stamps where required, at his own cost and expense.

(Testimony of Ove Fog.)

Sales to monopoly states shall be made on the same basis, except for an increase to cover cash discount and the cost of affixing state seals where necessary and required.

Prices to Retailers in New York City Territory.

Twelfth: Notwithstanding the maximum prices set forth in the order of the Office of Price Administration hereinbefore set forth, the Agent agrees that it will make sales of "Harwood's" to retailers in Metropolitan New York City territory on the basis of the price to wholesalers set forth in paragraph "Eleventh" hereof, plus railroad freight from Vancouver, Canada, to New York City, customs duties and Federal Internal Revenue Taxes (except the increase in such taxes effective April 1, 1944, which shall be billed as a separate item and on which no profit or markup shall be taken), and New York State Excise Taxes, plus the wholesale profit of 15% on the total of the foregoing; and that all sales by the Agent to retailers in Metropolitan New York City territory will not exceed the price based on the foregoing formula. On all such retail sales, the Agent will pay all commissions and selling expenses for its own account and at its cost and expense, it being understood and agreed that the importer's profit of \$1.60 per case, plus the wholesaler's profit or markup of 15% will be the total profit or remuneration to be received by it.

(Testimony of Ove Fog.)

Terms of Payment.

Thirteenth: The Agent agrees to open a revolving irrevocable letter of credit for \$200,000.00 in favor of the Supplier in the Chase National Bank of New York, main office, or such other bank mutually agreed upon by the parties hereto. On all shipments made by the Supplier, or its principal Duncan Harwood & Co., Ltd., of Vancouver, Canada, payment shall be made by the Agent through the medium of the said letter of credit against the following documents:

Commercial Invoice, Consular Invoice,
Railroad Bill of Lading, and 3 days Sight
Draft.

As each shipment is made and the draft paid, the letter of credit shall thereupon be brought up to \$200,000.00 by the Agent. It is understood that the Agent shall require sight letters of credit, irrevocable for 90 days and payable against documents from its wholesale customers. In the event that any shipment is in excess of the sum of \$200,000.00, then and in such event payment of the excess shall be by three (3) days sight draft, to which draft are attached the documents hereinbefore specified in this paragraph.

Notices.

Fourteenth: All notices shall be sent to the Sup-

(Testimony of Ove Fog.)

plier addressed to it at the address hereinbefore set forth and a copy to be sent to H. H. Klein at 3610 Clarinth Road, Baltimore, Maryland, and all notices to the Agent shall be sent to it at its address hereinbefore set forth—265 Tenth Avenue, New York City, N. Y.

Subject Clause Acts of God, etc.

Fifteenth: All orders given pursuant to the terms of this agreement are accepted subject to the ability of the Supplier and the ability of its principal, Duncan Harwood & Co., Ltd., to perform and should the Supplier or its principal be unable to complete the same by act of God, or the elements, public authority, public enemy, embargoes, obstruction to navigation, strikes, (stop) insurrection, fire, floods, unusual delay of common carriers, unavoidable casualties, inability to procure materials or supplies, order of requisition, request, regulation or order of any Government authority or other causes beyond the control of the Supplier or its principal, whether or not the cause be of the same class or kind as those enumerated above, which may directly or indirectly cause the Supplier or its principal to be unable to deliver or ship or prevent the Supplier's principal from manufacturing, blending or bottling the merchandise covered herein, thence any order or any part thereof remaining undelivered shall be cancelled without penalties or damage, and the Agent shall be entitled to the return of any de-

(Testimony of Ove Fog.)

posits or the release of any letters of credit if such have been established, and all or such undelivered portion of any order shall be null and void as though never having existed. In the event the Agent is prevented from performing the terms and conditions of the agreement by it to be performed due to any disability imposed by laws, rules or regulations of the United States, State, or City Governments, or any departments or agencies thereof, then to the extent of such disability or disabilities performance on the Agent's part as provided for herein shall be excused and Agent shall not be liable for such non-performance.

Arbitration.

Sixteenth: In the event of a dispute between the parties hereto regarding any of the terms of this agreement, each of the said parties shall appoint one arbitrator, and the two arbitrators so named to nominate and appoint a third arbitrator, and the three arbitrators so named shall determine the controversy presented to them pursuant to the Arbitration Laws of the State of New York, in such cases made and provided.

Seventeenth: This agreement constitutes the entire understanding between the parties hereto, and no amendments or changes thereof shall be valid and binding unless the same is in writing, signed by both of the parties hereto.

In Witness Whereof, the parties hereto have here-

(Testimony of Ove Fog.)

unto set their hands and seals the day and year hereinafter set forth.

Signed in New York City this 18 day of April, 1944.

R. C. WILLIAMS & COMPANY,
INC.

By /s/ W. E. MENGELUCE,
Vice Pres.

Signed in Havana, Cuba, this 8th day of May, 1944.

AGENCIAS DISTILADORES,
S. A.

By /s/ F. GURRI.

[Letterhead] R. C. Williams & Co., Inc.

April 20, 1944.

Agencias Distiladores, S.A.
411 Aguiar Street
Havana, Cuba

Gentlemen:

Supplementing the agreement between us made the 18th day of April, 1944, and it being the desire of the parties that the merchandise be marketed through the proper channels and in the proper manner in order to establish the business on a sound financial basis, it is further agreed as follows:

1. Out of the profit of \$1.60 per case as provided for in the agreement, the Agent agrees that

(Testimony of Ove Fog.)

it will pay a brokerage or selling commission of not in excess of 60c per case to brokers or selling agents selected by it but no such broker or selling agent will be selected by the Agent unless and until the written approval of the Supplier is first obtained as to each such broker or selling agent.

2. The Agent will make no sales to wholesalers in monopoly states without first having received written approval of the Supplier. The Supplier shall have the refusal of the customer or the quantity sold by the Agent to any wholesaler or monopoly state.

3. After the Agent (stop) has accepted and paid for its own account for sales to retailers for 12,500 cases or 12½% of the total of all shipments by the Supplier or its Principal, which ever is greater, then and in such event the Agent shall not be required to accept any further shipments. On all sales in excess of the above 12,500 cases or 12½%, whichever is greater, Agent shall not be compelled to pay for same unless and until the Agent shall have received from its customer a sight letter of credit irrevocable for 90 days in favor of the Agent. The Supplier or its Principal is to make shipment of any goods so sold to Agent's wholesale customers on open credit to Agent by forwarding the documents provided for in the agreement and with three (3) days sight draft to the bank and payment thereof is to be made by the Agent to the bank in accordance with such sight draft.

(Testimony of Ove Fog.)

4. The revolving letter of credit referred to in paragraph Thirteenth of the agreement is to be established by the Agent on or about May 8, 1944, upon receipt of acceptance of order for 100,000 cases.

5. All payments for merchandise are to be made in New York City.

Will you please sign the duplicate original of this letter where indicated and return to us.

Very truly yours,

R. C. WILLIAMS & COMPANY,
INC.

By /s/ W. E. MENGELUCE,
Vice Pres.

The above is approved and accepted.

AGENCIAS DISTILADORES,
S.A.

By /s/ F. GURRI.

[Endorsed]: Filed Dec. 29, 1948.

Mr. tum Suden: May I make some references to portions of this contract?

The Court: Are you going to put on any other witnesses?

Mr. tum Suden: No further witnesses.

The Court: Whatever you wish to call my attention to. [150]

Mr. tum Suden: If the Court please, I would like to point out one or two provisions of this contract. This contract is made on the 18th day of April, 1944, between the *Agencias Distiladores, S.A.* or *Distillers Agencies, Inc.*, a corporation, duly organized under the laws of the Republic of Cuba, called the supplier, and *R. C. Williams & Company, Inc.*, a corporation, hereinafter called the agent, and it recites that:

“Whereas, the Supplier is the exclusive agent of *Duncan Harwood & Co., Ltd.*, of Vancouver, Canada, for the entire world for the sale and distribution of the brand ‘*Harwood’s*,’ a blended Canadian whiskey of 90.4 proof, distilled, blended and bottled by the said *Duncan Harwood & Co., Ltd.*, under the supervision of the Canadian Government; and

“Whereas, it is the intention of the parties hereto that the Supplier appoint the Agent as its exclusive sales and distributing agent for the sale of the said brand of ‘*Harwood’s*’ in the United States of America, subject to the terms and conditions of this agreement;

“Now, Therefore, in consideration of these presents, and for other good and valuable considerations, the parties hereto mutually covenant and agree as follows:”

It then recites its authority to sell *Harwood* whisky and its authority to enter into this contract

with R. C. Williams and that R. C. Williams will obtain the necessary permits and licenses and then obtain an order from the Price Administration setting [151] forth the maximum price for sales.

“The Supplier appoints the Agent as its exclusive agent to distribute the brand of blended Canadian Whiskey under the label of ‘Harwood’s’ for the territory comprising the United States of America, that is, the states in which the distribution and sale of alcoholic beverages is now and/or will in the future be permitted and licensed.”

It gives the price to be paid by the agent to the supplier for their Harwood’s Canadian whisky, \$19.05 a case, so many bottles per case and so on.

R. C. Williams & Company is to supply strip stamps.

“It is understood and agreed that title to all shipments from the Supplier to the Agent shall pass f.o.b. Vancouver, Canada, and the Agent assumes all risk of loss after the merchandise is loaded on railroad cars at Vancouver, B. C., and a railroad bill of lading is issued for such shipment.”

It provides for the putting on the bottles a label that the whisky is imported by R. C. Williams.

Then it provides for a 12½ per cent allocation of imports to New York City for retail sales by the agent.

“Notwithstanding the maximum prices set forth in the order of the Office of Price Ad-

ministration hereinbefore set forth, the Agent agrees that it will make sales of 'Harwood's' to wholesalers on the following basis:

"\$20.77, net, per case, f.o.b. Vancouver, Canada, in [152] bond, which price is made up of the total of

"(a) cost of \$19.05

"(b) strip stamps of 12', and

"(c) profit of \$1.60

and that all sales to wholesalers will be at a price not to exceed the said price of \$20.77 per case;"

Then it provides for the prices to retailers in New York City, and those are things in which we are not interested. It provides the agent shall put up a \$200,000 revolving, irrevocable letter of credit in favor of the supplier. It provides also that all notices shall be sent to supplier addressed to its address in Cuba and also a copy to H. H. Klein at 3610 Clarinrh Road, Baltimore, Maryland.

"All orders given pursuant to the terms of this agreement are accepted subject to the ability of the Supplier and the ability of its principal Duncan Harwood & Co., Ltd., to perform and should the Supplier or its principal be unable to complete the same by act of God, or the elements, public authority, public enemy, embargoes, obstruction to navigation, strikes,"

the elements, and so forth—they are excused. In

case of any dispute, it is to be disposed of by arbitration. This contract, by the way, was signed in New York City on April 18, 1944, by Vice President of R. C. Williams & Company and in Havana, Cuba, on the 8th of May, 1944.

Then here is a letter to this supplier addressed to it at [153] Havana, Cuba, dated April 20, 1944, which purports to be a supplement to this agreement. It is dated the 20th of April, 1944. This is addressed by Williams to the agency:

“Supplementing the agreement between us made the 18th day of April, 1944, and it being the desire of the parties that the merchandise be marketed through the proper channels and in the proper manner in order to establish the business on a sound financial basis, it is further agreed as follows:

“1. Out of the profit of \$1.60 per case as provided for in the agreement, the Agent agrees that it will pay a brokerage or selling commission of not in excess of 60c per case to brokers or selling agents selected by it but no such broker or selling agent will be selected by the Agent unless and until the written approval of the Supplier is first obtained as to each such broker or selling agent.

“2. The Agent will make no sales to wholesalers in monopoly states without first having received written approval of the Supplier. The Supplier shall have the refusal of the customer or the quantity sold by the Agent to any wholesaler or monopoly state.”

And then it contains some provisions relative to the quantities to be sold at retail in New York City, and then there is a provision relative to the letter of credit.

“5. All payments for merchandise are to be made in New York City.” [154]

That is the contract under which R. C. Williams operated, if the Court please, in connection with the sale of Harwood. I have no further witnesses at this time.

The Court: The plaintiff rests.

Mr. tum Suden: Yes, Your Honor.

Mr. Farraher: May I address the Court?

The Court: Yes.

Mr. Farraher: I now move, if Your Honor please, to dismiss this action, and my motion is made under Section 41(b) of the Rules of Civil Procedure, and without waiving any right to offer evidence in the event the motion is denied, upon the ground that under the facts and the law the plaintiff has shown no right to relief. In the first place, I would like to address myself to the two contracts that were introduced to show that the contracts exactly fit in with the representations made with reference to them in the letters that are in evidence from the Williams & Company and from the Importers Division, Mr. Ravaud. The first contract is an agency contract and it employs Williams & Company as agent. It provides that the price to be paid by the agent shall be a certain amount of money, \$19.05 a case, and it provides for how much

it can be sold by the agent, how much the whiskey can be sold for, and then it says, "it being the agreement of the parties hereto, the agent will make the profits herein set forth as and for such commissions, allowances, remunerations for its efforts and services." Title passes [155] f.o.b. the distillery, and as the evidence has shown here, all shipments to this territory came directly from the distillery to the wholesalers in this particular territory, which means that the goods would be cleared through the agent in New York, would be paid for there, would be shipped from the distillery and invoiced by Williams & Company. It provides that in the mark-up, as it has been called, the agent may make a profit of \$1.60, and that out of that profit, as shown by this other supplemental agreement, they agree to pay to brokers not to exceed 60 cents. If they paid the 60 cents they would make a profit of \$1.00, the profit that we have been discussing. That is a peculiar provision because ordinarily the agent can pay the broker anything he wanted to, if he wanted to cut down his profit, but this is a case where the distillery is controlling the situation, for the very obvious reason, I suppose, he wants to take care of his own wholesale customers and keep them. The agent will make no sales to wholesalers in monopoly states without first having the written approval of the supplier. The supplier shall have the refusal of the customer or the quantity sold by the agent to any wholesaler or monopoly state." Your Honor knows there are several monopoly states

where the State buys. So you have here the agent in New York bound as to customer by the distillery, so that that is why they had to clear through Koerner. That is why Koerner, after a case was made to Koerner as shown by these letters, he had to get approval [156] from the distillery before he could ship it, because the distiller is the one in the last analysis to determine where the stuff would go.

We have here, if Your Honor please, an agency where the goods went directly from the distillery, shipped direct to the customer, and the Williams & Company acted as the go-between in New York, as the agent, and got a markup commission of \$1.00 a case. All of those facts—not exactly the terms of these contracts—but the fact that they had to get the consent of the distillery to sell out here, the fact that Williams & Company did the invoicing, which would indicate, of course, the title was passing through them, and as the payments were through Williams & Company, the transactions here, the sales into this particular territory were handled in just that way. There is no misrepresentation at all in any of the letters or any of the evidence that is given here that conflicts with that. There has been no evidence to indicate at all that more than a dollar profit was earned by Williams & Company. The objection apparently that Mr. Fog has is that if instead of the contract providing for \$1.00 commission in the form of a markup, it just set the commissions, that then he would not be entitled to any-

thing, but because it was in the form of a markup, it ceased to be a commission and therefore they misrepresented it to him because they did not let him know that they owned the whisky, which they owned only during the period in which they got their letter [157] of credit and transmitted it to the distillery and the whisky was shipped.

The evidence is very clear that Mr. Fog all the time knew of this profit. He, of course, knew the method in which it was being handled because he participated to some degree in it and endeavored to participate to a greater degree in it.

That argument ran along, as the record shows, from 1944, the early fall of 1944, right down to the date of the settlement. They were arguing about it all the time. These letters are full of it. In some letters Fog said they did not know they were getting anything out of it. One letter says, "We are making nothing out of it." Your Honor recalls it was a letter by Ravaud. And Mr. Fog admits the division was making nothing out of it. Certainly when the head of the division is saying, "We are making nothing out of it," he is not talking about the parent Company. He is talking about "we," the division. But when Ackerman came in and wrote these letters he said, "We are not making anything out of this, and all that the Williams & Company, the parent company, is making, is \$1.00, they knew that at all times and even discussed it on that basis. He comes up first and is going to arbitrate the matter. There is no question about what the testimony

is. He wants part of that dollar. That is all. That is the dispute. He had legal advice. He tried to avoid that question of legal advice, but he had legal advice. As he said, he got impartial advice, and I am sure Mr. [158] tum Suden does not give that kind of advice. He said he got impartial advice, and he hoped they would do the same. So they could see the legal situation. He said in here they were shipping. Well, they were in effect shipping. But he says they were shipping prior to the time of the settlement. He was not fooled by anything in that. He said at one time Jaburg said, "We haven't anything to do with it." That is perfectly ridiculous, because the entire record from Mr. Jaburg and from everyone shows they were invoicing the stuff and making one dollar profit on it, but they were not handling it through this division. When it came to that assurance, it was given freely. It had been an oral assurance earlier, in 1943. There was a dispute over this question. If Mr. Jaburg wanted to be cute about it, he would say, "We recall no such thing. Back in 1943 an oral statement asking me to confirm that?" But when this dispute was right at its height he said, "Certainly, the assurance was made and I will give it to you." The assurance was made when two carloads of rum were shipped in. These facts were known. He had advice from counsel. And he goes into this settlement and he takes a figure suggested by himself, \$10,000, and then he tries to enlarge it a little, to get the balance of a \$15,000 loan that he had made that

was still due added to it. This was a settlement brought on by him in his claim for these commissions and a settlement with all the facts within his knowledge, and it was a settlement on the figures selected by him of \$10,000. [159]

There is testimony that that was a gift, but that testimony is not serious enough to be considered on a motion of this kind because he admits he executed two documents accepting the \$10,000 and taking a check which recited it was in settlement of the dispute between them. I submit, if Your Honor please, that they have made no showing here that would justify our putting on a defense.

This case, of course, is predicated on fraud in the making of that settlement, although Mr. Fog has said it was not really a settlement, it was a gift. Why in the world Williams & Company would be any gift, the company itself—the check came from Williams & Company—why they would do it I do not know. But he alleges a settlement and he asks the Court to set aside that settlement on the ground he would never have made the settlement if it had not been for misrepresentations. He says, “Plaintiff relying on the truthfulness of the false and untrue statements and representations so made to him by defendant regarding the sale and distribution of Harwood’s whisky accepted the offer of settlement so made to him, and defendant did thereupon pay to plaintiff the sum of \$10,000. Plaintiff would never have agreed to the settlement so offered by defendant nor would he have accepted the

sum of \$10,000 paid him by Williams in settlement of his claim for commissions on the sale of Harwood's whisky if he had not believed the representations made to him by defendant."

Here are the representations that are alleged: "That the [160] defendant corporation had nothing to do with the importation or sale." He has testified that right on the bottle it said it was imported. He said he did not know they had anything to do with that. He has developed this sale proposition a little further. This is the representation which he says was made, and there is no testimony that any such representation was made. Of course, the testimony shows he did know that it was handled because he knew it was invoiced by Williams. This is no stranger to the business; this is a man who makes invoices himself.

"Plaintiff never discovered that the statements and representations made to him by defendant to the effect that defendant corporation had nothing to do with the sale and distribution of Harwood's whisky in the said Western Division area, and that it had not demanded or received any commissions or compensations for sales of such whisky so imported and sold, were false and untrue until the latter part of the month of January, 1948." We showed that he knew at all times that the whisky was being handled by Koerner of Williams & Company. We showed at all times he knew they were getting \$1.00 a case. He has not established any false representations, and he certainly has not estab-

lished the allegations of the complaint where he alleges such representations were made to him, and that such representations were false.

I submit, if Your Honor please, the case should be dismissed [161] upon the ground that the evidence shows that the settlement was in fact made, that it was a settlement of an actual dispute, and that there was no misrepresentation or fraud inducing the settlement.

Mr. tum Suden: If the Court please, for the purpose of this motion, this is a motion for non-suit, I take it.

The Court: It is not a motion for a non-suit under the federal system, because the Court makes findings in determining a motion of this kind. It is a little different from the old procedure of the State Court.

Mr. tum Suden: However it is handled, the plaintiff in this action has established by his testimony and through correspondence that he was employed by R. C. Williams & Company, the Continental Import Division thereof; he was employed by its manager, Mr. Ravaud, to represent this division, which is nothing more nor less than a desk or R. C. Williams & Company, and I think Your Honor has made the observation that there is no distinction between the two, but he was employed and he was given a certain fixed salary together with a promise of an override or commission of so much a case on all liquor which would be handled or sent out into his territory which was assigned to him, either by

R. C. Williams or by Continental Imports. The commission is the main factor in his compensation. He was given that assurance and that assurance was confirmed by Mr. Ravaud or by Mr. Jaburg at the time he authorized Mr. Ravaud to write [162] that letter of September 13, 1945. The assurance was that any liquor sent out here by R. C. Williams into this territory, he would get his commission on it, just the same as any other commercial transaction where a representative is appointed—for instance, in the automobile line, if a territory is assigned to an agent out here and the manufacturer sells in this territory, the agent gets his commission. There is no distinction between the two. The question naturally came up to Mr. Fog when he saw Harwood's whisky bottles in his territory and naturally it aroused his curiosity, and the correspondence shows as soon as this appeared he made inquiry about it and he received replies which were disarming, if not deceitful. He received first the information that they were not handling it, they were simply clearing it for the distillery, and that they were not making any money on it, and that "we" in that letter that Mr. Farraher has referred to means R. C. Williams and not just the Import Division. But anyway, under the contract between Mr. Fog and R. C. Williams and the Import Division, it doesn't make any difference; if they shipped liquor out here, sold it out here, then he was entitled to his commission. The answer admits they sold it out here, and the contract that they had with the

distillery agencies in Cuba, which is not the distillery, but which is a selling agency, shows the transaction is a pure out-and-out commercial transaction. They bought this liquor, they imported it, and they were guaranteed a profit of \$1.60 a case after [163] deducting 12½ cents or 12 cents for strip stamps, and that contract is a plain agency contract for the selling of this liquor.

The Court: Probably that is the only way these fellows distributed their whisky to their clients in the United States.

Mr. tum Suden: Nevertheless, Williams took over title.

The Court: They did, but, of course, every act in their functioning was prescribed with particularity. They told them how much they had to pay, who they had to pay it to, who they had to sell it to, and they paid them for that service. It was a sale. There is no question about that.

Mr. tum Suden: It was an out-and-out sale, but they retained control, which is not unusual, and is really customary in contracts of this kind. They could refuse to sell if they did not have the supply, and they could refuse to recognize a customer if they wanted to.

The Court: What bothers me about this case is not any of those facts. I think your client might have done very much better for himself at the time he made this settlement with the defendants here if he had had you or some other good lawyer represent him instead of acting as his own lawyer, because

I think he probably may have succeeded in establishing a claim for some substantial amount. Irrespective of the technicalities involved, Williams & Company was shipping or causing to be shipped into his territory the merchandise, and not through the [164] Import Division, which was the assurance that was given to him when he took his job, and it may well be that he was entitled to a portion of this dollar that they made. I am not here to make new contracts for people who make improvident contracts.

Mr. tum Suden: That may be true, but the point is this, if Your Honor please: they gave him this assurance that if R. C. Williams shipped any merchandise out into this territory, that he would receive his commission on that particular shipment, and that is what they have done. The question that seems to bother you is the so-called question of settlement, the \$10,000.

The Court: That is the very thing your client was negotiating about. That is what he wanted. He said, "I am entitled to my commissions on this merchandise. You are not giving them to me. I want something done about that." He fussed around about that, thought about arbitration, and then instead of going to a lawyer—and some people never learn not to make that mistake—he acted on his own and he made a contract which may now appear to be somewhat improvident. He went in with his eyes open.

Mr. Farraher: As counsel said, he wanted to get

part of the dollar and he ended up by getting \$10,000 and another contract and he took that.

The Court: In my opinion, so far in this case there isn't the slightest bit of misrepresentation or fraud. Your client went after the very thing he wanted to get, and he ended up with less than what he could have gotten. That is all there is to it. [165]

Mr. tum Suden: My position on that is this: Every time Mr. Fog approached Mr. Jaburg, Mr. Ravaud or anybody in authority, he was assured by them that they were not selling it in his territory and they were not shipping it into his territory.

The Court: That is why I asked your client those questions. His case cannot rest on any such matter as that. The familiarities that surrounded the transaction between the defendants and the distillery do not determine the nature of the defendant's acts. I think the defendants did ship the merchandise into the territory.

Mr. tum Suden: Correct.

The Court: He knew it and he saw it with his own eyes, and he called it to the attention of these people, and then he tried to get them to pay a commission on that for having done that, and he ends up by settling the matter for \$10,000 and taking a new contract.

Mr. tum Suden: Over the period of time this matter went on they consistently told him they were not shipping it into here. They told him they were simply accommodating the distillery and they beat him down every time.

The Court: That is when he should have had

Mr. tum Suden or some other capable lawyer, and he wouldn't get beaten down.

Mr. tum Suden: Are they to be permitted to take advantage of that misrepresentation? They beat him down until he said, "I guess you are right. Maybe I am wrong." And then he explained [166] to Your Honor why the \$10,000 was given to him because the selling of this liquor, the shipping of this liquor into his territory prevented him from making further sales, influenced his relationship with his client, and they in the meantime were making a great deal of money in the retail trade.

The Court: He probably could have gotten more than \$10,000 if he asked for it.

Mr. tum Suden: I think he is entitled to it.

The Court: I am not intending to be facetious. Certainly the defendants did not pay the \$10,000 by way of a gift, just to be nice to him. They paid him the \$10,000 because they thought he had some kind of claim against them and they got off with that \$10,000.

Mr. Farraher: If I may refer to the deposition which was taken in New York, Mr. Ravaud testified it was given to Mr. Fog to take a bad taste out of his mouth.

Mr. tum Suden: I want to ask this question: Do you think that if Mr. Fog had definite information that they were shipping this into this territory, and that he was entitled to his 25 cents a case, which would have amounted to over \$100,000, do you think that he would have settled for \$10,000? It is not

logical and it does not make sense. If he knew that, as they claim he knew, he would not have been here today. He would have had a different situation.

The Court: I do not know what induced him to make the [167] settlement.

Mr. tum Suden: I know what induced him. It was their representations to him that he had nothing coming and they were not handling it and selling it.

The Court: Mr. tum Suden, your client has admitted on the witness stand, and the documents are distinct that he knew, the defendant was shipping this liquor into his territory. Now, he knew that. He can't take the witness stand in my court and look me in the eye and tell me, after he said that in writing, that he can by word of mouth wave that aside and say, "What I knew then I say now I did not know."

Mr. tum Suden: No, there is an explanation to that. It does not make any difference whether the invoices showed that Williams & Company were shipping into this territory. That was part of the procedure evidently arranged between Williams and the distillery in clearing the transaction. It is normal in such cases where there is a carload shipment or two carloads of shipment to be sent out into a territory for the wholesaler or the distributor to notify the manufacturer or the distiller to ship it direct to So-and-so and bill them for it, or ship it direct, they give the shipping orders and the invoices will show that the order came from R. C.

Williams to the distillery to ship some wholesaler in this territory and Williams bills the wholesaler for the amount of the shipment. That is in order to avoid extra transportation and extra storage. It doesn't mean [168] anything. It is not at all inconsistent with the so-called plan or explanation given Mr. Fog by R. C. Williams & Company. I maintain that those representations that they did not ship and they did not sell are the pertinent statements in this case and that he is entitled to his commission, because that put him off his guard. That was a misrepresentation as to the true situation. Why didn't they tell him the exact situation? They never did that. Continually, all the way through, they gave him an explanation that was not true. They kept it up until the time he signed the release. I maintain he is entitled to his commission. That is what the man took the position for, and if they can circumvent and avoid paying commissions by some sort of arrangement that they are only acting as agents or clearing it for a distiller, then none of these contracts mean anything, and any representative that relies upon his contract for a commission could be circumvented and his claim defeated, and I think that is what happened in this case. They did not have to have any salesmen. There weren't any salesmen. They simply had to take orders for Harwood whisky, and it was too bad in their imagination that they had to pay Mr. Fog anything at all on the sale which apparently they did not have to make. Nevertheless, that was

their agreement and he was entitled to his commission, and I do maintain that a case has been made out for the plaintiff in this action.

The Court: If I were trying the case as between the [169] plaintiff and the defendants as to whether or not he is entitled to commissions, the picture presented would be entirely different. At first blush, without hearing any other side of the case at all, it would appear there is a *prima facie* merit to the claim for commissions as far as Harwood is concerned. Of course, that is not the issue that is presented to me. The issue that is presented here is whether or not an agreement which the parties made should be set aside. The law favors the settlement of controversies by individuals, those who have controversies with one another. The law does not like to set those agreements aside. When it does, there has to be persuasive evidence of fraud or misrepresentation. It is not a thing that is likely to be contemplated.

Mr. tum Suden: I maintain if Mr. Fog had the benefit of counsel at the time, this thing was explained to him, it would be different, but he is an individual who does not understand the terms of these agreements and he is taken into their office——

The Court: Now, look. I am not particularly persuaded by the fact that he does not understand about it, because he made a very good advocate for himself on the witness stand. At every possible opportunity he argued his case to me, and

in this memorandum I notice that he referred to, C for Identification, he expresses himself fluently and explicitly, and in this paragraph that both of you have referred to, he says in language that is completely unequivocal, "Beginning in the early part of [170] 1944, the wholesale liquor division of R. C. Williams & Company, Inc., made direct shipments into my territory of Harwood's Canadian whisky 90.4 in absolute violation of their agreement with me." That is a categorical, explicit, affirmative statement. That has no qualifications to it at all.

Now, he said in answer to my question he thought that was the case. I could not believe that statement of a man of his obvious intelligence and experience. That is the statement of a man who knows what he is talking about. He is making a charge there. That is the charge he is making, and on the basis of that charge he wants a consideration shown him. That is why he is making that statement. It is obvious to me he did know. Of course, he knew Harwood liquor was being sold.

Mr. tum Suden: I do not not agree with that for the following reason: He prepared that document in contemplation of an argument with, say, an arbitration board and at the time he wrote that—and that is why we have that question of arbitration—he believed that Harwood whisky was being shipped in here. That was his belief. He had no proof of it but he believed it, and this was his argument. This was written for his own cause, to present his own cause. It was never sent to anybody. It was

his picture of the thing as he would present it. It does not follow that he knew, but that is what he was going to claim, and he drew that up.

Subsequent to that time when he met the parties here in the [171] Palace Hotel, after the document was written, they again told him the same story, that they were simply clearing it for the benefit of the distillery, that he had no commission coming, they were not selling it, they were not shipping it.

The Court: It was their contention that he was not entitled to a share of the commission on this Harwood transaction.

Mr. tum Suden: True.

The Court: A court passing upon that might decide that they were wrong, but that was their position, and maybe upon a full consideration of that matter, which we have not before us, it may be a court might decide in their favor. I do not know. All I have said is at first blush, having heard only one side of the case, it would appear that the plaintiff might have a pretty good case against them for these commissions. That is not on the basis of any difference between whether they were clearing it or whether it was an out-and-out transaction. It is on the basis that this commodity was caused to come into this market.

Mr. tum Suden: True.

The Court: And it doesn't make any difference as to the technicalities or means by which that was accomplished. That is the basis, that this man would have this claim against the defendants under

his agency contract. So therefore, there is no question of any misrepresentation as to the mode by which it is done, because the essence of his claim is not the means by which defendants caused the whisky to be introduced into this [172] market, the papers that they signed, the nature of their contract, but the fact that they caused the whisky to be introduced into this market that affects his position under his contract with them, and that fact he knew. There was no misrepresentation about that. Nobody concealed that from him. That is the claim he is asserting against him, that if this whisky was to be introduced into this market, it had to be through the concern with whom he had the contract, and that they had agreed with him that everything that came into this market would be through that import division, and therefore if they did bring whisky in, and they did bring it through the importing division, if the defendant did that, then by virtue of that fact, he was entitled to get a commission on that.

Mr. tum Suden: True.

The Court: That is the basis of his claim.

Mr. tum Suden: That is the basis of his claim, but they persuaded him out of it.

The Court: They persuaded him out of it by giving him \$10,000.

Mr. tum Suden: By giving him \$10,000 and by telling him he had no commission coming. They didn't handle it. They didn't sell it.

The Court: That sort of argument would ap-

ply in any case where a man made a settlement agreement and was convinced that he was talked out of it by his opponent. You go into your [173] settlements with a lawyer and you want \$10,000 and the other lawyer only wants to give you \$5,000, and you keep persuading him and finally you persuade him to give you \$10,000. He comes along later and wants to set aside that agreement, saying, "Tum Suden was too persuasive; he talked me out of that \$10,000 and I am going to set aside that document."

Mr. tum Suden: I would not be so persuasive in making such a settlement and rely upon misrepresentations and misstatements. I might persuade, I might argue, but I am not going to resort to falsehood, deception, and if I did such a thing that contract could be set aside, and that is what I claim here: they persuaded this man he had no commission coming. They told him they did not handle it or sell it. He did not discover the true nature of the transactions until he came in contact with the agent of the Internal Revenue.

The Court: I do not think the Internal Revenue agent gave him any other information. He already knew it was \$1.60. The only difference between what he learned from the agent and what he knew before, he said on the witness stand, was that the agent told him it was \$1.72.

Mr. tum Suden: Correct.

The Court: But he knew before it was \$1.60. He had that information already.

Mr. tum Suden: No, he never had that information. He did not have that information until we took the deposition in New [174] York and then they admitted it was \$1.60.

The Court: I saw a letter there in which a man told about having to pay 60 cents a case and they had to pay \$1.00.

Mr. tum Suden: They claimed they had to pay 60 cents per case. They didn't say on \$1.60.

The Court: They said they had to pay 60 cents out and they made a dollar. The only difference between what the man knew before and what he knew later, the agent down there told him it was \$1.72.

Mr. tum Suden: And that they were selling at a marked up price. They were not getting a commission for handling it. I submit the contract should be set aside.

The Court: I do not blame you for bringing this suit. I will say that to you because maybe you might have got some further benefit out of the matter. But I cannot see in the record the slightest evidence of any misrepresentation or fraud of any kind that is sufficient in law to set aside an agreement that the parties have made.

Mr. tum Suden: Except that they got his signature by telling him something that was not true. That is the whole basis.

The Court: Maybe they told him something that was not true, but it has to be of material significance.

Mr. tum Suden: It is the basis of the whole

claim. If they were selling it, he is entitled to his commission.

The Court: I couldn't find in my conscience to set aside any [175] agreement on such a technicality as he makes on the witness stand, that he would be entitled to his commission for \$1.60 calculated under one plan or another plan. I do not see any warrant for doing that. The damage to him arises not by virtue of the manner in which the contract was made between the distiller and the supplier; the damage arises because of the introduction and the disposition and the distribution of the liquor in his territory. That is what causes him his damage.

Mr. tum Suden: True.

The Court: And that he knew about.

Mr. tum Suden: And when he asked for his commission on it, they told him, "We are not selling it. Our agreement is if we sell it. But we are not selling it. We are just accommodating the distillery. We are making a misrepresentation." There is a fundamental misrepresentation there. It is not true, and he did not find out the true situation until January, 1948, and it was on the basis of that statement of theirs that they convinced him that they were not selling it or that they were not shipping it into this territory in accordance with the agreement, and he said, "I will have to believe you. I guess that is right."

The Court: Mr. tum Suden, I wish I could decide this case more favorably to you because I think your client was probably entitled to more than he got. But I can't remake the contract. This matter

should have been litigated in the first instance. This litigation is a nice afterthought and if you could succeed [176] in getting something for your client out of this litigation because of the settlement unfavorable to him that was made in the first instance, I see no objection, but I can only decide the precise matter that is before me. My sympathies are more or less in favor of the plaintiff in this case, despite the fact that in my opinion he did not make a good witness. But I can't find any evidence in the case of a lawful character that would warrant me setting aside this transaction on the ground of fraud or misrepresentation. The evidence does not meet up to that stature, in my opinion.

Mr. tum Suden: Of course, I can't argue with Your Honor and I do not want to prolong this. I simply maintain they did misrepresent the situation to him and got his signature on the basis of that misrepresentation, and therefore the agreement should be set aside.

The Court: For the reasons I have stated, I hold that the motion for dismissal is good, and it may be granted upon findings to be prepared and served in accordance with the ruling. [177]
[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing and ac-

companying documents and exhibits listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant:

Complaint for Cancellation of Agreement on Ground of Fraud and for Money Due.

Answer to Complaint.

Deposition of Hugo F. Jaburg and Jean Ravaud.

Deposition of Ove Fog.

Findings of Fact and Conclusions of Law.

Judgment.

Motion for New Trial and Notice of Motion for New Trial.

Order Denying Motion for New Trial.

Notice of Appeal to Circuit Court of Appeals Under Rule 73 (b).

Appellant's Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Defendant's Exhibits Nos. A, B, & C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of May, A.D. 1949.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ E. VAN BUREN,
Deputy Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 12242

OVE FOG,

Plaintiff and Appellant,

vs.

R. C. WILLIAMS & CO., INC., a Corporation,
Defendant and Appellee.

STATEMENT OF POINTS RELIED ON AS
GROUNDS FOR APPEAL

The Statement of Points relied upon as grounds for appeal is as follows:

At the conclusion of plaintiff's case, defendant made a motion for dismissal under Rule 41(6) of the Rules of Civil Procedure for the United States District Courts on the ground that plaintiff had shown no right to relief. The trial court granted the motion and directed findings.

It is appellant's contention that the court erred in granting said motion in that plaintiff in said action had clearly shown a right to relief and that the findings of fact and conclusions of law are not supported by the evidence.

Dated this 27th day of May, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Appellant.

Receipt of Copy of above is admitted this 27th day of May, 1949.

SULLIVAN, ROCHE,
JOHNSON & GANAKE.
/s/ JULES JACOBS,
Attorney for Appellee.

[Endorsed]: Filed May 27, 1949.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now Ove Fog, plaintiff and appellant herein, and designates the following as the Record on Appeal in the above-entitled matter:

1. Complaint, filed herein on the 11th day of June, 1948.
2. Answer of defendant, filed herein on the 27th day of July, 1948.
3. Order for Judgment, filed herein on December 29, 1948.
4. Findings of Fact and Conclusions of Law filed herein December 28, 1948.

5. Notice of Entry of Judgment filed herein January 21, 1949.

6. Motion for New Trial, filed herein January 31, 1949.

7. Order denying motion for new trial, filed herein March 24, 1949.

8. Notice of Appeal, filed herein on April 23, 1949.

9. Deposition of Hugo Jaburg and Jean Ravaud taken on November 15, 1948.

10. Reporter's Transcript of Testimony taken in the above-entitled matter on December 28th and 29th, 1948, together with all exhibits offered or introduced in evidence during the taking of said testimony.

This Designation of Record on Appeal dated May 27th, 1949.

/s/ RICHARD TUM SUDEN,
Attorney for Plaintiff and
Appellant.

Receipt of Copy of above Designation of Record on Appeal is hereby admitted this 27th day of May, 1949.

SULLIVAN, ROCHE,
JOHNSON & GAMAKEN.

/s/ JULES JACOBS,
Attorneys for Defendant and
Appellee.

[Endorsed]: Docketed and Filed May 27, 1949.

[Endorsed]: No. 12242. United States Court of Appeals for the Ninth Circuit. Ove Fog, Appellant, vs. R. C. Williams & Co., Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 18, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.